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*May 1
57*

RE REPORTS
OR
CASES
ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
JOSEPH S. BOSWORTH,
CHIEF-JUDGE OF THE COURT.

VOLUME II.

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JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

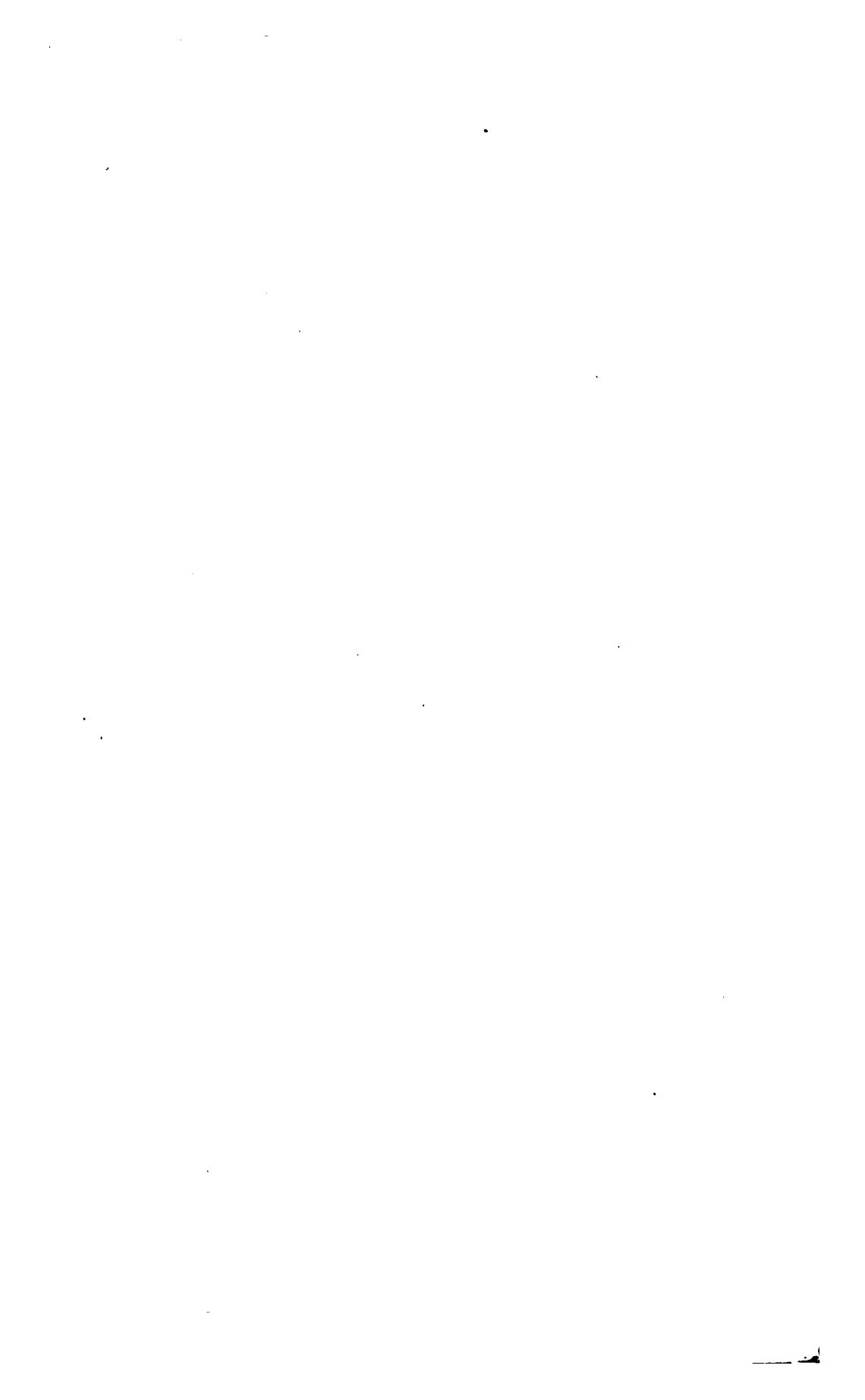
JOHN DUER, CH. J.,*
JOSEPH S. BOSWORTH, CH. J.,†
MURRAY HOFFMAN,
JOHN SLOSSON,
LEWIS B. WOODRUFF,
EDWARDS PIERREPONT,
JAMES MONCRIEF,‡

} JUSTICES.

* Died August 8th, 1858. His term of office will expire on the 31st of December, 1859.

† Appointed Chief-Justice on the 31st of August, 1858.

‡ Elected in November, 1858, to fill the vacancy caused by the death of Chief-Justice Duer.



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CASES
ARGUED AND DETERMINED
IN
THE SUPERIOR COURT,
OF THE
CITY OF NEW YORK,
AT GENERAL TERM.

JAMES B. WILLIAMS and another v. WILLIAM JOHNSON.

A MANUFACTURER of goods, who, in order to designate his own manufacture, has adopted names, marks, and labels, which are peculiar, and not theretofore used, is entitled to be protected by a court of equity in the use thereof, as trade marks, against fraudulent or deceptive imitation by others.

This is true, although the article manufactured by him is composed of well-known ingredients, in general use for that purpose, and which any person may combine and sell at his pleasure; trade marks in such case being appropriately employed to denote a manufacture of the article, by the person using them, and to notify those who buy and use the article, that his peculiar skill, in combining the ingredients, have been employed therein.

An injunction will be granted to restrain the use by another of labels, devices, or handbills, in imitation of, or simulating such trade marks.

Whether a mere name of an article, or a designation of a place of manufacture, can or cannot become the subject of protection, as a trade mark, the Court will restrain the use thereof in such a combination, with peculiar devices and labels, as will tend to deceive the public, and induce the erroneous belief in the minds of dealers and consumers, that the articles are manufactured by the person introducing or adopting the name, to distinguish his goods.

Slight differences calling for scrutiny, or concealed by artifice, so as to escape the attention of the unwary, are not sufficient to protect the imitator of a trade mark from liability.

(Before DUMA, Ch. J., HORRMAN and WOODRUFF, J. J.)
Heard, April 16th; decided, June 27th, 1857.

APPEAL from an order made at Special Term, before Mr. Justice Slosson, granting an injunction to restrain the defendant, *pendente lite*, from selling, disposing of, or advertising, or offering

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for sale, any soap (not manufactured by the plaintiffs) put up in boxes, wrappers, or labels, in a form and style, alleged in the bill of complaint, to be a fraudulent imitation of the boxes, wrappers, labels, etc., used by the plaintiffs, to designate their own manufacture.

The complaint herein alleged that, in or about the year 1845, the plaintiff, James B. Williams and his brothers, were manufacturers of soap at Manchester, Connecticut; that they manufactured a particular kind of soap, to which, in order to identify it as their manufacture, they gave the name of "Genuine Yankee Soap," made in cakes of about two inches square, each cake covered with tinfoil; that upon one side of each cake was attached an octagonal pink label, with the words printed thereon, "Genuine Yankee Soap, manufactured at Manchester, Conn., by Williams & Brothers, Chemists and Apothecaries. To prevent counterfeits, their signature will be upon each cake." Upon the other side of each cake was attached another octagonal pink label, with the words printed thereon, "The Genuine Yankee Soap is warranted superior to any foreign compound for shaving and the toilet, affording a copious and heavy lather, which does not dry on the face, leaving the skin soft and smooth." And at one end of each cake was attached another pink label with the words in writing, or in a resemblance to writing, "Williams & Bros."

That the said soap was put up in pasteboard boxes containing one dozen cakes each, and each box covered with a brown paper wrapper, with the words thereon, "One dozen Genuine Yankee Soap, warranted superior to any foreign compound for shaving and the toilet, manufactured at Manchester, Conn., by Williams & Brothers, Chemists and Apothecaries. To prevent counterfeits, their signature will be upon each cake."

Upon these several labels, the arrangement of the lines, the form of the letters and style of the printing was peculiar and in some degree fanciful.

The complaint states that under the above designation, and put up in the manner described, Williams & Brothers, in or about 1845, introduced their said soap into the market for sale, and it was favorably received, became extensively known by purchasers and dealers, and obtained a large sale, and the demand therefor greatly increased. That subsequently, by changes in the busi-

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ness of Williams & Brothers, and by transfer to them, the plaintiffs succeeded to the manufacture of this soap and the exclusive right to use the style, designation, and labels, and mode of packing above described, and still continue to manufacture and sell the same; and that by reason of the superior quality of the said soap, and the favorable reputation which it maintained, the manufacture and sales thereof had, at the time of the defendant's interference, become and were large, extensive and profitable.

That the defendant, well knowing these facts, and with intent to deceive and defraud the public who deal in or use the said soap, has manufactured, or caused to be manufactured, and is continually manufacturing, etc., and has in his possession large quantities of soap of an inferior quality, which he puts up in a style and manner precisely similar to that in which the plaintiffs' is put up. That it is cut up into cakes of the same size as those of the plaintiffs', each cake encased in tinfoil, and upon each cake three pink labels of the same form used by the plaintiffs, upon one of which are printed the words, "Genuine Yankee Soap, manufactured at New York, by L. Williams & Co. To prevent counterfeits, their signature will be upon each cake." Upon another are printed the words, "The Genuine Yankee Soap is warranted superior to any foreign compound for shaving and the toilet, affording a copious and heavy lather, which does not dry on the face, leaving the skin soft and smooth." And upon the third are the words, in writing or in a resemblance to writing, "L. Williams & Co." That each box is covered with a brown paper wrapper, with the words thereon, "One Dozen Genuine Yankee Soap, warranted superior to any foreign compound for shaving and the toilet, manufactured by L. Williams & Co., New York. To prevent counterfeits, their signature will be upon each cake."

Upon these several labels, the arrangement of the lines, the form of the letters and style of printing was, in almost every particular, an exact copy of the labels used by the plaintiffs, and the complaint states that the name L. Williams & Co. is fictitious, and is used to deceive, etc.

The plaintiffs alleged damage, etc., and prayed an injunction.

The defendant answered the complaint, denying that the plaintiffs had any exclusive right to use the designation "Genuine Yankee Soap," or the marks and labels above described; denying

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that the soap made by him was inferior to that made by the plaintiffs; that the plaintiffs had sustained any damage by any wrongful act of his; averring that the term, "Genuine Yankee Soap," described a particular style and quality of soap, and did not identify the person or persons by whom, or the place where, it was manufactured; that the article known in the market by that name, "has been for years" manufactured by different manufacturers of soap in different parts of the United States, and sold by that name, and that it could not be appropriated by the plaintiffs. The answer denies that the name, L. Williams & Co., is fictitious, or is used as a colorable imitation, assimilating the trade mark of the plaintiffs. On the contrary, it states, that so early as 1850, there was a firm in New York, composed of L. Williams and others, carrying on business under the name of L. Williams & Co., for and on account of whom the said article of Genuine Yankee Soap, as now made by the defendant, was made until L. Williams & Co. went out of business in 1856, and that such soap bore their name, and had acquired a favorable name and reputation, and that the rights of L. Williams & Co. to manufacture said soap, and to use the bills, labels, name, and trade marks used by L. Williams & Co. has been transferred to the defendant, being the same now used by him.

The plaintiffs, in support of their motion, produced the affidavits of several dealers in soap, to the effect that the article, known in the market as "Genuine Yankee Soap," is known as the manufacture of Williams & Brothers, of Connecticut. That that name does not denote the name of the article merely to distinguish it from other kinds of soap, but to denote that it is the manufacture of Williams & Brothers. That it was first introduced into the market by Williams & Brothers, by whom the name was adopted to distinguish it as their manufacture, and as their trade mark. That the several deponents dealt therein several years before they were aware that imitations thereof were sold. That they have never known any soap to be made and sold in the market, as and for "Genuine Yankee Soap," by any others than Williams & Brothers, except such as were put up in boxes and accompanied by labels and wrappers which were close imitations of those used by Williams & Brothers, and thus calculated to deceive the public by inducing the belief that

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such imitations were the manufacture of said Williams & Brothers.

An injunction was granted at Special Term, restraining the defendant from "selling, or in any way disposing of any soap in boxes or otherwise, with labels or wrappers containing the words, 'Genuine Yankee Soap' printed or written thereon; and from advertising, selling, or offering to sell any soap whatever, (unless the same has been manufactured by, or procured from, the plaintiffs,) as and for 'Genuine Yankee Soap'; and also from using in any manner the words or name 'Genuine Yankee Soap' in connection with soap manufactured or offered for sale by him; and also from assimilating in any way, or making, or using any colorable imitation of said name 'Genuine Yankee Scap,' or of the words Williams & Brothers, or either of them as adopted and used by the plaintiffs."

From the order so made the defendant appealed.

J. C. Dimmick, for the appellant.

Waldo Hutchins, for the respondent.

BY THE COURT. WOODRUFF, J.—The defendant is engaged in a gross and palpable endeavor, by imitating the marks and labels used by the plaintiffs, to deceive the public and obtain patronage, which would in all probability be attracted to the plaintiffs.

This the defendant is doing, not only by closely imitating the plaintiffs' marks and labels, but by falsely representing his soap as a Yankee manufacture, and made by persons named Williams, when, in truth, it is made in the City of New York by the defendant, William Johnson.

No words can describe or give a conviction of the fraud the defendant is practising, so clearly as the inspection of the marks and labels, and on that inspection no candid mind will say that the conduct of the defendant is not properly characterized by the language above employed, unless it be thought that terms of more severe reproach were due to him.

There is no claim by the plaintiffs that soap is not an article composed of well-known ingredients, which any person may combine and sell as soap of his manufacture at his pleasure.

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If there are distinguishing peculiarities wherein the plaintiffs' soap has gained a name or reputation, we do not perceive that such peculiarities lie in any thing but the skill employed in combining the ingredients.

In all the benefits arising from that skill, and the reputation acquired thereby, the plaintiffs should be protected, so far as, consistently with the rights of others, it may be done.

Whatever marks or devices are employed by the plaintiffs, to denote that the soap is made by them, and is combined by the same skill that was employed in the making of soap heretofore made, and sold by them bearing the same marks and devices, are entitled to protection—as, for example, if the plaintiffs had chosen to stamp their soap with some impression having no other meaning than to distinguish their manufacture from that of others, and had given it out as their mark, and, by this discrimination, soap of their manufacture had acquired reputation and sale, they would be plainly entitled to protection.

They have adopted, in reference to *their* manufacture (of an article which any and every one may manufacture and sell, if he please) a form and size of cake, a particular mode of covering and packing, a combination of three labels on each cake, an exterior handbill upon the box, and have so arranged the whole as to suggest, to any one desiring to purchase their soap, upon an inspection, that the article is theirs, and made by them, like that heretofore made, sold and known as their manufacture.

All this the defendant has copied, with an exactness which is calculated to deceive even the wary, much more to entrap those who are not in the exercise of a rigid scrutiny.

It is true that the defendant has put upon his labels New York as the place of manufacture, and L. Williams & Co., instead of Williams & Brothers, as the manufacturers. But the latter designation imports a falsehood, and tends rather to create than destroy the impression that the soap is made by the plaintiffs; and the use of the word New York, in its obscure printing, if it be read, falls far short of suggesting to the public that it is not the soap manufactured by the plaintiffs.

Lott Senator, in *Taylor v. Carpenter*, (reported 2 Sandf. Chy R. 613,) says, "Honest competition relies only on the intrinsic merits of the article brought into market, and does not require a resort to

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a false or fraudulent device or token. That certainly cannot deserve the appellation, which studiously gives to the product of pretended superior skill, the name and exact resemblance and imitation of the article with which it professes to compete. A disguise is not usually assumed for an honest object. It is a mark more characteristic of deception and fraud. It defeats the very end and object contemplated by legitimate competition, the choice to the public to select between the articles sold, and operates as a deception and imposition on the dealer."

The late Vice-Chancellor Sandford, in *Coats v. Holbrook*, (2 Sandford, Chy R. 594,) states the general rule to be well settled, as follows: "A man is not to sell the goods or manufactures of B. under the show or pretence that they are the goods or manufactures of A., who, by superior skill or industry, has established the reputation of his articles in the market. The law will permit no person to practice a deception of that kind, or to use the means which contribute to effect it. He has no right, and he will not be allowed, to use the names, letters, marks or other symbols by which he may palm off upon buyers, as the manufacture of another, the article he is selling, and thereby attract to himself the patronage that, without such deceptive use of such names, etc., would have enured to the benefit of that other person, who first got up or was alone accustomed to use such names, marks, letters or symbols."

It will be seen that in the cases referred to, as in the present, the imitation enjoined against embraced, not merely names, but a simulated mode of putting up the goods, even including the peculiar spools and wrappers or envelopes employed by the plaintiffs.

The same general principles are stated and illustrated with great force and clearness in the case of *The Amoskeag Manufacturing Co. v. Spear*, in this Court, (2 Sandf. S. C. Rep. 599,) by Mr. J. (now Ch. J.) Duer, and in reference to the variations in the labels used by the defendant, by the use of the words, New York, as the place, and L. Williams & Co. as the name of the manufacturer, his observations are singularly appropriate: "In order to convey a false impression to the mind of the public as to the true origin or manufacture of goods, it is not necessary that the imitation of

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an original trade mark shall be exact or perfect. It may be limited and partial. It may embrace variations that a comparison with the original would instantly disclose; yet a resemblance may still exist that was designed to mislead the public, and the effect intended may have been produced. Nor can it be doubted that, whenever this design is apparent, and this effect has followed, an injunction may rightfully be issued, and ought to be issued." And in that case it is held that a style, as well as a name, of a manufacture is entitled to protection, and its unauthorized use is conclusive evidence of a fraudulent intent.

It is so palpable as to admit of no reasonable doubt that the devices employed by the defendant were calculated and intended by him to secure the benefit of the reputation which the plaintiffs had acquired. He is in this respect entitled to no favor. The Court in considering the propriety of enjoining him, pending the litigation, will not feel called upon to be zealous to aid him by refined distinctions so that he may evade the letter and violate the scope and spirit of the adjudged cases.

We have no hesitation in saying, that his acts are a clear infringement of the plaintiffs' rights. He has copied the form, appearance, color, style, and substantial characteristics in all respects, which distinguish the plaintiffs' goods.

The form of the present injunction is, perhaps, not that which is best adapted to secure the plaintiffs what they are clearly entitled to, and in this respect the terms of the injunction may be made to conform more clearly to the views which governed this Court in the case of the *Amoskeag Co. v. Spear*, above referred to. Whether, upon the taking of the proofs in the cause, it will appear that the particular words, "Genuine Yankee Soap," are to be deemed descriptive of the kind of soap, which any one may make and sell by its proper name, or are terms properly designating the plaintiffs' manufacture, and so to be descriptive of their peculiar skill in making an article already in known and common use by its proper and only generic name, soap, is perhaps not free from doubt. It is quite clear, that so far as it indicates the place of manufacture, it is a fraud on the part of the defendant to use it. Still the case referred to decides, that though it be in this particular a fraud on the part of the defendant, the plaintiffs cannot

NEW YORK—JUNE, 1857.

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have an injunction unless it shall appear that it designates their own manufacture, and that its use by the defendant operates to the prejudice of a right acquired by them.

Without deciding whether the defendant may or may not use either of the words, "Genuine" or "Yankee," in any possible combination, we think it sufficient to say, that he may not use the labels, or devices, or handbills which he is using, nor any other like labels, handbills, or devices, in imitation of, or simulating the labels, devices, or handbills used by the plaintiffs as set forth in the bill of complaint, or any other similar labels, devices, or handbills calculated to deceive the public, or create the belief that the soap he sells is the soap made or sold by the plaintiffs under the name of Genuine Yankee Soap.

If the defendant desires that the injunction order be made to conform to this latter view of the subject, his counsel may prepare and serve an order to that effect, in which case the plaintiffs' counsel may submit amendments, and the same will be settled on two days' notice.

The costs of the appeal, \$10, will abide the event of the suit.
Ordered accordingly.

Nott v. Thayer.

ELIPHALET NOTT *v.* JAMES S. THAYER, WILLIAM FLAGG and
THE MAYOR, etc., of the City of New York;
and

AUGUST BELMONT, *et al.*, Trustees, etc., CAROLINE S. BELMONT,
MARY GRIFFIN and BENJAMIN STEPHENS *v.* ELIPHALET
NOTT, ROBERT W. LOWBER, THE MAYOR, etc., of the City
of New York, JAMES S. THAYER, WILLIAM FLAGG, CAMPBELL,
MOODY, VAN PELT, ROBERTS, BENJAMIN, SMITH, THE N. Y.
GAS LIGHT CO. and BROWER.

P. S. was, prior to 1805, the owner of a farm on Manhattan Island, in the City of New York, lying on a semi-circular cove or bay of the East River, and between what are now 9th and 23d streets, in the said city. By his will, he divided this farm into two parts, making a street, which ran through the same, and which reached the river near the centre of the cove, the dividing line, and devised the northerly portion to his son P. G. S., and the southerly portion to his son N. W. S. And thereafter, in 1810, the Corporation of New York made a grant to N. W. S. of a water lot in the river easterly of his portion of the farm, making the continuation of the centre line of Stuyvesant street, the northerly boundary of such grant. On a survey of the cove, it appears that the continuation of the centre line of Stuyvesant street outwardly to a line drawn between the two extremities of the shore line, would divide the intermediate space into two parts nearly corresponding in relative or proportionate quantity with the length of the shore lines of the two divisions of the farm so held by P. G. S. and N. W. S. The plan of this part of the City of New York was laid out under the Act of the Legislature of April 3d, 1807, and the streets thereby established ran to the shore of the cove in a direction diagonal to the cove, and so as to cross Stuyvesant street at an acute angle, in such wise that 15th street, which crossed Stuyvesant street near the point where it reached the water, would, when extended into the East River, run far south thereof at the line drawn between the two extremities of the cove, and divide the cove very unequally; and the other parallel streets (16th, 17th, 18th and 19th) if so extended, would in like manner cross the centre line of Stuyvesant street. (Diagrams, Noa. 1 and 3.)

Subsequently, the Corporation of New York made grants to Bradford and others, claiming under N. W. S., of all the ground under the water in the cove, lying southerly of the said centre line of Stuyvesant street, and extending into the river to a street, or proposed street, called Tompkins street; and to Flack and Gouverneur, claiming under P. G. S., of all ground under water, extending in like manner into the East River, lying northerly of the said centre line of Stuyvesant street extended. (Diagram No. 2.)

By an Act of the Legislature of 13th April, 1826, the new street, called Tompkins

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street, theretofore laid out and approved by the corporation, was established as the permanent exterior line of the city on the East River, in front of the cove above mentioned, extending northerly to 23d street; and the statute enacted that all grants made, or to be made, of lands under water, should be construed as rightfully made to extend thereto.

In 1835 another Act was passed, authorizing the corporation to designate where the exterior line or street to the eastward of this part of the city shall be in place of Tompkins street. And in 1850 certain ordinances were passed establishing an exterior line, called Avenue D, further outward in the East River, beyond and easterly of the mid Tompkins street.

Upon a bill filed, on the one hand, to confirm the grants made to N. W. S., and those claiming under N. W. S. and under Bradford and others, and to establish the centre line of Stuyvesant street extended into the East River, as their just northern boundary, and to restrain the corporation from making new grants southerly of that line; and on a bill filed, on the other hand, asserting that such former grants were void, and that the claimants under P. G. S. and Flack and Gouverneur were entitled to grants in front of their lands, to extend outwardly into the East River in the lines or direction of the streets established in 1807, extended eastwardly; and to settle the rights of the various present proprietors in the cove.

Held, upon a review of the various statutes, etc., referred to in the opinion of the Court and statement of the case,

First. The line of Stuyvesant street, continued to Tompkins street, would have formed the proper natural and equitable boundary, as between N. W. S. and P. G. S., had the corporation undertaken to make grants to them of the space within the cove; upon the principle of an equitable division between them in respect to their ownership on the shore, assuming either that, by virtue of such ownership of the upland, they were entitled, under the Act of 1807, to claim and have such grants, or that the corporation were willing to concede to them such a right, and this notwithstanding that, according to the plan of the city adopted by the commissioners under that act, the streets as laid out by them, if continued into the cove, would have followed lines running in a different direction.

And such line of Stuyvesant street formed a proper northerly boundary in the grant to N. W. S. of 1810, as between him and his brother, at the time the same was made.

Second. The same line of division was equally equitable and proper, as between Flack and Gouverneur on the one side, and Bradford on the other, as parties succeeding to the title and rights of N. W. S. and P. G. S. respectively, at the time those grants were made; and the plaintiff, Nott, as succeeding to Bradford's title, is entitled to claim, as against the parties to the suits who have succeeded to Flack and Gouverneur, that Stuyvesant street thus continued, and constituting the actual boundary between their respective grants, is the true, proper and equitable line by which those grants respectively ought to have been made.

Third. However true it may be that the lines or direction of the streets continued may form the most convenient and, under certain circumstances, a proper basis upon which to make water grants, that still this is a matter of mere convenience, and that this alone creates no rule of obligation on the corporation, nor

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one that gives to the parties entitled to or claiming grants an absolute right as against the corporation, or as against each other, to have them run by such lines. That the question as between co-terminous owners of the shore line, is always one of equitable apportionment of the space to which the grants are to apply, and that the exact lines of division must necessarily depend upon the relative directions of the shore line and of the exterior line to which it is intended the grants shall extend.

Fourth. Without deciding, or intending to express an opinion, whether the corporation, under the Act of May the 11th, 1835, (providing for the designation, etc., of a permanent exterior line,) may or may not lawfully project or lay out a new exterior line or street to the eastward or outside of Tompkins street, or whether, if they once have adopted a line within Tompkins street, as such new exterior line, they have thereby exhausted all their power under said act; *held* that no fee is given to the corporation by implication, as certainly none is given in terms by the Act of 1835, in the lands under water outside of or to the eastward of Tompkins street, and that, consequently, no grant of such lands made or to be made by the corporation conveys or can convey a fee in such lands to the grantee.

And further held, that the act cannot be construed to extend by implication the grants already made, bounding on Tompkins street, to an exterior line or street outside of Tompkins street.

Fifth. The parties to the suit, whose grants bound on Tompkins street, have no right, actual or pre-emptive, to grants outside of, or beyond that street; nor have they any right or title, derived from the Act of 1835, in the land under water between that street and Avenue D, the exterior line recently adopted; nor have they, as adjacent owners, a right to fill in such intermediate space, and become the proprietors thereof under the provisions of the Act of 1818.

Sixth. The parties are concluded by the grants already made bounding on Stuyvesant street, as the dividing line between the parties claiming adversely to each other in these actions, such line being also an equitable and proper one; and the claim of the owners to the north of that street cannot be sustained.

(Before DURE, Slosson and WOODRUFF, J. J.)

Heard, November, 1856; decided, July, 1857.

APPEALS from a judgment rendered at Special Term in April, 1854, on trial before Mr. Justice Hoffman.

The two actions were in the nature of cross actions, involving the same questions and affecting, in the principles involved, the same parties; and by stipulation they were tried together, and the same proofs used, and one judgment pronounced in both.

Cross appeals were taken by the plaintiffs in each action, and by the Mayor, &c., and also by several of the defendants in the second suit.

Proper exceptions were taken by the appellants to raise the various questions considered on the appeals.

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The following statement, aided by the diagrams annexed, is all that is deemed necessary to make the questions discussed and decided intelligible.

By the 3d and 14th sections of the Charter of the City of New York, known as the Dongan Charter, granted in 1686, and by the 37th section of the Montgomerie Charter, granted in 1730, the corporation of the City of New York became the owners in fee of all the land or shore between high and low water-mark around Manhattan Island not before granted, appropriated, or patented.

By the 38th section of the last-named charter, the ground under water extending four hundred feet into the East River from low water-mark, from Corlaer's Hook southward to Whitehall, was also granted to the city.

By the 2d section of the Dongan Charter and the 16th section of the Montgomerie Charter, power is given to the corporation to establish, order, and direct the making and laying out of all streets in or through the City of New York and the Island of Manhattan.

On the 3d of April, 1798, an act of the Legislature was passed, upon the petition of the corporation, authorizing "the Mayor, &c., of New York to lay out, according to such plan as they shall or may hereafter agree upon or determine, regular streets or wharves," of the width of seventy feet, "in front of those parts of the city which adjoin the North and East Rivers respectively, as they may think proper," and providing "that, as the buildings of the said city shall be further extended along the said rivers, it shall and may be lawful for the said Mayor, &c., from time to time, to lengthen and extend the said streets." And by the 2d section it is enacted, "that the said streets, or wharves, shall be made and completed according to the said plan, by and at the expense of the proprietors of land adjoining, or nearest and opposite to the said streets, or wharves, in proportion to the breadth of their several lots," "and that the respective proprietors of such of the said lots as may not be adjoining to the said streets, or wharves, shall also fill up and level, at their own expense, according to such plan" "the spaces lying between their said several lots and the said streets and wharves, and shall, upon so filling up and leveling the same, be respectively entitled to and become the owners of the said intermediate space of ground in fee simple."

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(Re-enacted in 1813. See act to reduce, &c., 2 Rev. Laws, p. 432, §§ 120 and 121.)

Petrus Stuyvesant derived title in 1780, under his great grandfather, Governor Stuyvesant, to a farm on Manhattan Island, extending along the shore of the East River, from a point below what is now Ninth street, to a point near Twenty-third street, and at his death was seized thereof in fee.

This farm was situated on a semi-circular cove, or bay, indenting the shore from the northern boundary of the farm to nearly its southern extremity.

In 1802 Petrus Stuyvesant made his will, devising his property along the river above mentioned, from about Ninth street, on the south, to the centre of a street called Stuyvesant street, on the north, to his son, Nicholas William Stuyvesant; and devised to his son, Peter G. Stuyvesant, the parcel running along the river, from the centre of the street called Stuyvesant street, to a point on the north, near what is now 23d street. The testator died in 1805.

Stuyvesant street ran to the East River, at a point near the centre of the semi-circular cove above mentioned.

During the life of Petrus Stuyvesant, the street designated as Stuyvesant street on the map used as evidence in this action, entitled, "Plan of the City of New York, drawn from actual survey, by Cassimir Th. Goerck and Joseph T. R. Mangin, city surveyors, New York, November, 1803," was laid out and opened by the said Petrus Stuyvesant, to the shore, at high water-mark. The line of such street is shown on Diagram No. 1, subjoined.

On the 3d of April, 1807, an act was passed by the Legislature empowering certain commissioners to lay out and establish streets in the City of New York. Under and in accordance with the provisions of that act, such streets were laid out and established by the commissioners, and those streets contiguous to the premises in controversy in this action, as designated upon the map in evidence, are shown upon the said diagram, No. 1.

By the 15th section of the same act of April, 1807, the Commissioners of the Land-Office were directed "to issue letters patent granting to the Mayor, Aldermen and Commonalty of the City of New York, and their successors forever, all the right and title of the people of the State of New York to the lands covered with

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water along the westerly shore of the East River or Sound, contiguous to and adjoining the land of the said Mayor, Aldermen and Commonalty, at and from low water-mark, and extending four hundred feet into the said river from the north side of Corlaer's Hook, at the northerly boundary of the lands covered with water, whereof the said Mayor, Aldermen and Commonalty are now seized, to the distance of two miles north, along the westerly shore of the said East River or Sound; *provided always*, that the proprietor or proprietors of the lands adjacent shall have the pre-emptive right in all grants made by the corporation of the said city of any lands under water granted to the said corporation by this act."

Under and in accordance with the provisions of the said act, the Commissioners of the Land-Office did, on the 26th day of December, 1807, issue to the said Mayor, Aldermen and Commonalty letters patent for the same.

The strip of land, two miles in length, so granted, began below Ninth street, and extended above the premises in controversy.

On the 7th of March, 1810, the Corporation of New York made a grant to Nicholas W. Stuyvesant of a water lot, along and on the southerly side of a line extended from the centre of Stuyvesant street into the East River, and marked "F" on the Diagram No. 2, hereto annexed, the boundaries and location of which are shown upon the same. This parcel had one hundred and ninety feet on the upland, and extended in depth into the river five hundred and forty feet, which was beyond the limit of the four hundred feet mentioned in the patent from the State.

At the time of the execution of such last mentioned grant, the said Nicholas W. Stuyvesant was the owner in fee of the upland bounded by high water-mark, extending from the centre of Stuyvesant street southerly to a point below Tenth street.

Prior to October, 1824, the corporation of the City of New York formed a plan for the establishment of a street called Tompkins street, located in the waters of the East River much further from high water-mark than the exterior line of the last named grant, and far beyond the four hundred feet granted to the city by the State. Its location appears on the several diagrams, Nos. 1, 2 and 8.

On the 25th of October, 1824, the Corporation of New York executed a grant to Nicholas W. Stuyvesant of a water lot at the foot of Ninth street, bounded westerly by high water-mark, east-

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erly by the westerly side of the proposed new street to be made, called Tompkins street, and lying, according to the dimensions specified in the grant, between lines drawn in extension of the centre lines of 9th and 10th streets respectively.

The location of the grant so made appears upon Diagram No. 2, on which it is designated by the letter "A."

On the 16th of June, 1824, the said Nicholas W. Stuyvesant conveyed to Charles Henry Hall a piece of ground, bounded westerly by the centre line of Avenue C, northerly by the centre line of 13th street, southerly by the centre line of 11th street, and easterly by the East River, together with all the right of the said grantor to the land and land covered with water, water rights and privileges, between the centre lines of 11th and 13th streets, extending into the East River in front of the premises conveyed, as far as the corporation grants shall or may extend into the river; but reserving to the grantor, his heirs and assigns, forever, the right to the ground under water, and all grants made or to be made thereon on the north-easterly side of the centre line of 13th street, and on the south-easterly side of the centre line of 11th street, extending into the said East River.

The land so conveyed to Charles Henry Hall is marked on the said Diagram No. 2 by the letter "C."

And on the 28th of February, 1825, the Corporation of New York executed a grant to Charles Henry Hall, of the water lot, vacant ground, and soil under water, bounded westerly by high water-mark of the East River; northwardly by the continuation of a line drawn through the middle of 13th street; easterly by the westerly side of a certain new street to be made, called Tompkins street; and southwardly by a certain other water lot, granted or to be granted to Nicholas W. Stuyvesant.

The location of the grant so made, appears upon the said Diagram No. 2, on which it is designated by the letter "B."

By deed dated April 18th, 1825, Peter Gerard Stuyvesant conveyed to John Flack and Nicholas Gouverneur all that certain piece or parcel of land bounded easterly by the East River; northerly by land now, or late, of William Heyward and wife; westerly by the First Avenue, and southerly by a piece of ground heretofore called Stuyvesant street; together with whatever water-

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right the said Peter Gerard Stuyvesant was entitled to appertaining to the said land.

The premises so conveyed appear, by the said Diagram No. 2, in that part of the upland lying easterly of the First Avenue between Stuyvesant street and 23d street.

And thereafter, on the 1st day of August, 1825, the corporation granted to the said Flack and Gouverneur that certain water lot, ground and soil under water, to be made land and gained out of the East River, bounded westerly by high water-mark of the East River; northerly by a certain water lot of the said Mayor, etc., in front of land now or late belonging to William Heyward and wife; easterly by a certain new street hereafter to be made, called Tompkins street; and southwardly by the continuation of a line drawn through the middle of Stuyvesant street, containing in breadth, on the easterly side 1840 feet, on the westerly side 2600 feet, on the northerly side 637 feet 5 inches, and on the southerly side 1345 feet.

The location of this grant appears marked "G" on the said Diagram No. 2.

On the 12th of April, 1826, the Legislature, in view of the proposed location of the said Tompkins street, passed an act, by which it was provided, "That Tompkins street, along the East River, as laid out and approved by the Mayor, Aldermen and Commonalty of the City of New York, shall be the permanent exterior street on the East River, between Rivington street and 28d street, and that all grants made or to be made by the said Mayor, Aldermen and Commonalty, shall be construed as rightfully made to extend thereto."

At the time of the passage of this act, Nicholas W. Stuyvesant was the owner of the upland bounded by high water-mark, extending from the centre of Stuyvesant street southerly to the centre of 13th street; and also held the before mentioned grant from the Mayor, etc., of March 7th, 1810, marked "F" on the said Diagram No. 2.

On 1st day of September, 1832, Nicholas W. Stuyvesant executed a deed conveying to Neziah Bliss the upland and the lands under water, beginning at the intersection of the north line of 13th street with the centre of Avenue B; thence running north-easterly along the centre of Avenue B to the centre of 14th street;

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thence north-westwardly along the centre of 14th street to Stuyvesant street; thence easterly along Stuyvesant street, as extended, to the easterly side of Tompkins street; thence southerly along the east line of Tompkins street to the northerly line of 13th street; thence north-westerly along the northerly line of 13th street to the place of beginning.

This conveyance includes the parcels of upland marked "D" and "E," and all the ground under water between Stuyvesant street and the north line of 13th street extended, and extending to the east side of Tompkins street.

Whatever title Neziah Bliss acquired under this conveyance, subsequently became vested in Eliphalet Nott, the plaintiff in the first above entitled action.

On the 13th of May, 1844, the Corporation of New York granted to the said Eliphalet Nott the water lot bounded northerly by the centre line of 14th street, 1851 feet; easterly by the easterly side of Tompkins street, 316 feet 4 inches; southerly by the centre line of 13th street, 1895 feet; and westerly in part by high water-mark and in part by the centre line of Avenue B.

This grant is distinguished on the said Diagram No. 2 by the letter "K."

On the 22d of June, 1848, the corporation granted to Hezekiah Bradford, (who, at that time, held the title to the gore of upland on the south side of Stuyvesant street, and between that street and 14th street, marked "E," and, also, whatever title to the water lot in front thereof was granted to N. W. Stuyvesant in 1810, as above stated) all the residue of the ground under water bounded by the centre line of Stuyvesant street, 1845 feet on the north; by the easterly line of Tompkins street on the east, 1469 feet 4 inches; by the centre line of 14th street, 1956 feet on the south; and by high water-mark on the west.

This grant is designated on the said Diagram No. 2 by the letter "L." All the title of Hezekiah Bradford to any of the said premises became vested in Eliphalet Nott before these actions were commenced.

These facts complete the history of the title under which the plaintiff, Nott, claims all ground under water below or southerly of the centre line of Stuyvesant street extended into the East River, and between that line and 13th street.

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The plaintiffs in the second above action (holding under Francis Griffin) and the several defendants, Thayer & Flagg, Campbell, Moody & Van Pelt, Roberts & Benjamin, Smith, Brower and the New York Gas Light Company, derive their titles respectively by *mesne* conveyances from the above mentioned Flack and Gouverneur to several pieces of ground under water, which lie to the northwardly of the centre line of Stuyvesant street and westwardly of Tompkins street.

The conveyances to them are made with reference to a map, whereon the streets and avenues are extended over the ground granted to Flack and Gouverneur, and the streets respectively are made the boundaries of the ground conveyed, on the northerly and southerly sides thereof, and Tompkins street is made the easterly boundary, wherever the plot granted bounded thereon, and where the specific plot conveyed bordered upon the southerly line of the grant to Flack and Gouverneur (i. e. the centre line of Stuyvesant street) that is designated as the southerly boundary. But in each case all the right, title and interest of the grantors in the ground under water in front of the premises conveyed is also granted, and, in some cases, mentioning in terms several blocks lying southerly of the centre line of Stuyvesant street, and north-easterly of 15th street, extending outward into the East River. Several of the parcels so owned and claimed are designated upon Diagram No. 3.

These conveyances, and the claim of the parties under the same, proceed upon the idea that the claim of the upland proprietors to grants under water entitles them to follow the lines of the streets, and that the corporation is bound to follow the lines of the streets in making water grants in front of the shore line, and have no power to make valid grants, except in conformity to such lines of the streets.

The claim of the plaintiff, Eliphalet Nott, is, that the centre line of Stuyvesant street, which line constituted the original dividing line between Nicholas William and Peter Gerard Stuyvesant, holding all the upland situated upon the shore or line of the cove, should be extended easterly in the same direction into the river, as the proper dividing line between all water grants made or to be made to the upland owners; because the lands being situated upon a cove or circular shore, such a division is equitable; be-

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cause the corporation had, in fact, made such water grants (viz., to Flack and Gouverneur on the north, and to N. W. Stuyvesant and to H. Bradford on the south) in conformity with such division; and because, as insisted upon other grounds, such grants alone are in conformity with the legal rights of the parties.

While, on the other hand, if the line of the streets, as laid out on the upland, are to constitute the guide in making water grants, and, when extended into the river, to become the boundaries of the water grants to the upland owners, then grants to the defendants corresponding with such lines would extend outward in front of the natural shore line, and cut off owners to the southerly of Stuyvesant street from their just share of the ground under water.

This effect is seen by reference to parcels marked "S" on Diagram No. 3, which are claimed by Belmont and others, (the plaintiffs in the second suit,) or by the defendants, or some of them.

On the 11th of May, 1835, the Legislature passed an act (Session Laws of 1835, chap. 268, p. 809) by which it was enacted, Sec. 1. "It shall, and may be lawful for the Mayor, Aldermen, and Commonalty of the City of New York, in common council convened, to adopt such plan as they may deem most expedient for the regulation of that part of the said city which lies between 13th street and 23d street, the First Avenue and the East River, and to designate and direct where the permanent exterior line or street to the eastward of such part of the said city shall be, in place of that part of Tompkins street which now lies, or is laid out to the eastward thereof, on the present plan of the said city." Sec. 2. "Such plan as may be so adopted by the said Mayor, Aldermen and Commonalty for the regulation and laying out of the above-mentioned part of the said city, or for the permanent exterior line, or street thereof, shall become and be deemed, in law, as part of the map or plan of the said city."

Although at a previous date an exterior line, within and in part to the westerly of Tompkins street, seems to have been contemplated, and a resolution was passed by the corporation, February 8, 1833, referring to a plan recommended November 12, 1832, and adopting such plan, the Corporation of New York in July and November, 1850, passed certain ordinances establishing an ex-

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terior line still further extending the streets into the river, and far outward beyond Tompkins street, thus giving still greater importance to the question, whether the proprietors of lands on shore, or theretofore filled up, were entitled to follow out in the direction of the streets on the shore.

This new exterior line is shown on the said diagram, No. 3.

The bill in the first suit was filed by the plaintiff upon allegations, among other things, that notwithstanding the grant made to Bradford of all the water lot lying southerly of the centre line of Stuyvesant street extended to Tompkins street, the corporation of New York, on the petition of Thayer and Flagg, are about to grant to them the four blocks of ground, under water, lying chiefly south of the said southerly line of Stuyvesant street, and extending outwardly into the river to the said new exterior line. The bill seeks to restrain any such grant, and, in effect, to establish the title of the plaintiff to all water grants and land under water southerly of such centre line of Stuyvesant street extended. The four blocks claimed by Thayer and Flagg, and so alleged to be about to be granted to them, are marked on Diagram No. 3 "Thayer and Flagg;" "Thayer and Flagg."

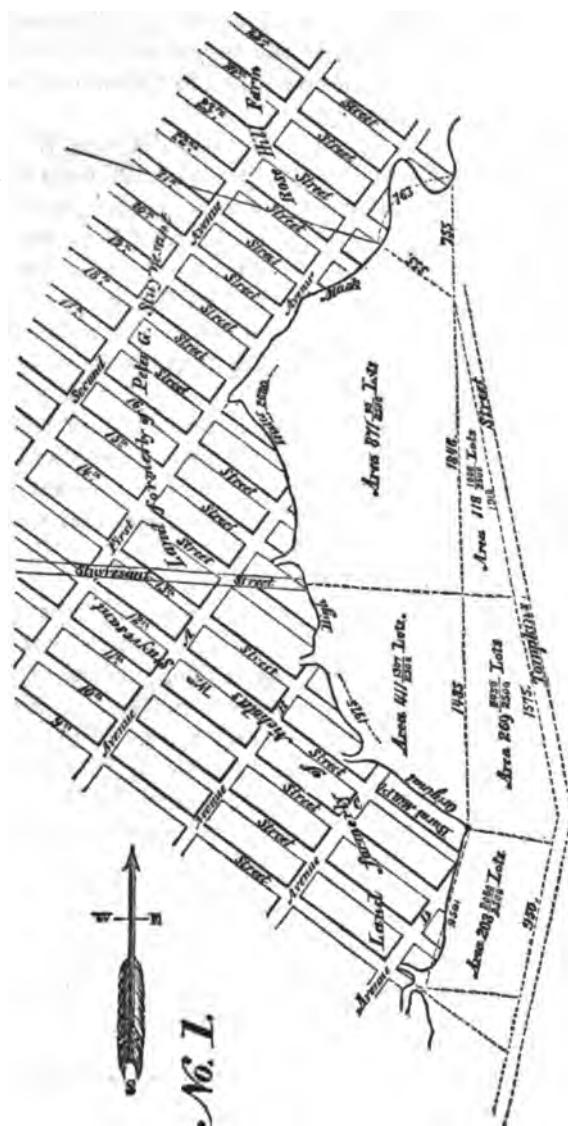
The bill in the second suit is filed to establish the right of Belmont and others, the plaintiffs therein, to water grants in front of the lands which they hold under Francis Griffin, upon their claim that such grants should be made in lines corresponding with the extension of the lines of the streets into the river, and to establish and settle the rights of all the owners between 18th and 23d streets, in relation to water grants, and to compel the Mayor, &c., to grant to the said plaintiffs according to such claim. Their claim, in this respect, is in the principle thereof the same as that of the defendants in the first suit.

The actions came on for trial at Special Term, and a map and survey was caused to be made with the area and lines thereon showing the dimensions and boundaries of the cove in question, so far as contained within the line of Tompkins street, which is hereto annexed, marked No. 1.

Robert W. Lowber was made a party, as having an interest jointly or in common with Eliphalet Nott.

The facts found by the Judge are in substance as above stated.

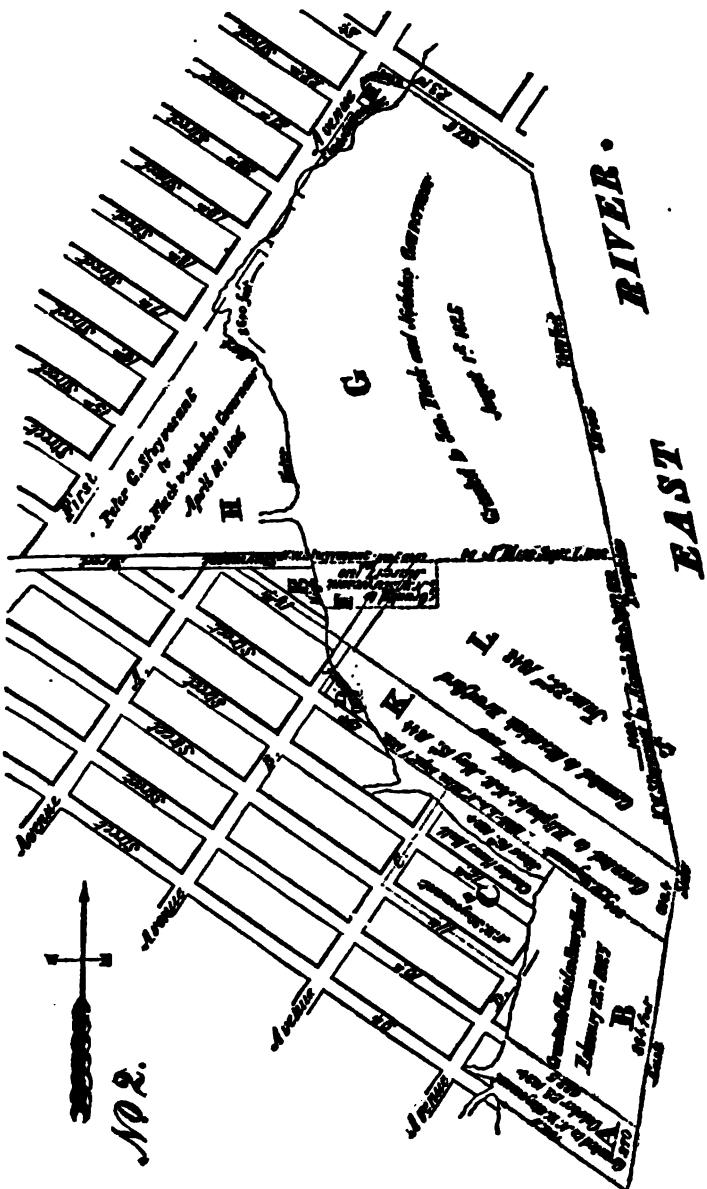
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**RIVER****EAST**

NEW YORK—JULY, 1857.

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The opinion of Mr. Justice Hoffman, upon some of the leading questions arising on the trial, is as follows:—

HOFFMAN, J.—It appears to me that the steadiest lights by which I can trace my way through the difficulties of this important case, will be to examine it under the following heads:—

I. The question of jurisdiction.
II. The rights and position of Petrus Stuyvesant, father of Nicholas William and Peter G. Stuyvesant, as owner of the shore, prior to his death, in 1805.

III. The rights and position of Nicholas W. and of Peter G. Stuyvesant, under the will of their father after his death, in 1805, and before the statute of the 3d of April, 1807.

IV. The rights and acts of the same parties, or their grantees, after the passage of the Act of 1807, and before the Act of April 13, 1826.

V. The rights of the same parties, or their grantees, after the Act of 1826, and prior to the Act of the 11th May, 1835.

VI. And lastly, their rights as affected by the Statute of 1835, and the consequent ordinances of the corporation.

[I. The objection to the jurisdiction not being made a point at General Term, the observations of the Judge are omitted.]

II. Before and at the period of the death of Petrus Stuyvesant, in 1805, the Corporation of New York, under the charters of 1686 and of 1730, owned in fee the whole strip of land between high and low water, around the island of New York, with exceptions not important to be here noticed. Mr. Field has described this strip as *the tide-way*. Counsel have generally adopted it; and the phrase will be so employed in this opinion.

I consider that it does not now admit of dispute, that the corporation was seized of this tide-way, free from any pre-emptive privilege in any one; that they had absolute power to dispose of it to whom they pleased—at the price they pleased—and without notice to the owners of the shore of their intention.

The cases of *Rogers v. Jones*, (1 Wendell, 237,) *Lansing v. Smith*, (4 Wendell, 9,) and of *Whitney v. The Mayor, etc.*, (not reported) with the case of *Furman v. The Mayor, etc.* in this Court (5 Sandf. R. 16) and in the Court of Appeals, have put the question at rest in our State.

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But while such were the absolute strict powers of the corporation, yet in practice they acted upon the equitable principle, that the adjoining owners were entitled, as a matter of propriety, not of right, to the first privilege. It is on this basis that the subject is placed in a report signed by the present Justice Ingraham, of the Court of Common Pleas, and by the late Edward Taylor, one of the most judicious men who has acted in the councils of the city, made in the year 1837. It related to land, part of the 400 feet, granted in the Charter of 1730. Of course, it applies with equal strength to the tide-way in this location; and it contains the assertion of a power to take and use the land as the Corporation thought fit, with the recognition of the fairness and honesty of dealing which calls for a proffer of it to the adjacent owner.

The title of Petrus Stuyvesant was derived, in point of fact, from the Dutch government. It must be taken as derived from that government, or from the English. We have no other sources of title in this State. And, treating it as coming from one or the other, the law upon this question is the same.

It results—that prior to the death of Petrus Stuyvesant, he had no right whatever in the land under water in front of his possession on the shore. He had the probable interest of acquiring such a right in preference to others, from the custom of the corporation, and the presumption that it would be adhered to.

His death occurred in 1805, and the title, appointed to his sons by his will of 1802, then took effect.

III. In 1805, then, Peter G. Stuyvesant and Nicholas W. Stuyvesant took the estate under their father, extending on the shore of the East River from below what is now 9th street to 23d street. And the dividing line of the devise to them was the point on the shore where Stuyvesant street touched it. It is sufficient now to say (without advertting to the numerous points taken by counsel about this street) that the will marks it as a line of division. It may, then, for the present be treated as nothing more than a defined boundary line, such as a fence or a row of trees, coming to the shore at high water.

Thus Nicholas W. Stuyvesant had title to all the shore line southward of this point down to the extreme limit near 9th street; and Peter G. Stuyvesant had title to all the land northwardly from the same point to the other extreme limit near 23d street.

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And then, also, Nicholas W. possessed the beneficial interest of the presumption that the Corporation would give him the first privilege of acquiring the title to the tide-way adjoining his shore line; and Peter G. had a similar beneficial interest for the extent of his shore line. It is not possible to characterize their privilege as any thing higher.

At that period, viz., between 1805 and 1807, as well as before, the right of the Corporation in relation to the forming of streets stood thus:—

By the Charter of 1686, by the Act of October 9, 1691, and the Charter of Montgomery (§ 16), full power was given to establish, appoint and lay out all streets in the City of New York and Manhattan Island. The Act of 1691 was renewed in this particular by a Statute of April 16, 1787. (1 *Greenleaf*, 441.) A street, therefore, at the line or within the line of low water, could have been made.

Again, the Act of the 3d of April, 1798, contained a clause empowering the corporation, as the buildings of the city should be further extended along the rivers, from time to time to extend and lengthen the said streets and wharves. This enactment was pursuant to a petition of the Corporation, that they might lay out streets of 70 feet in width in front of that part of the city which adjoined the rivers. This act was passed after two ordinances of the Corporation, of great importance, which have never been noticed in the important cases on this subject.

These ordinances established West and South streets by definite lines and bounds, and were accompanied with and based upon maps and surveys now in the office of the street commissioner—South street being laid out up to Corlear's Hook.

I think that this clause of this statute was useless, unless it meant to sanction a continuation of South street, beyond Corlear's Hook, of the same width; but it, of course, could not be laid beyond the limit of 70 feet from the tide-way, though it might be on such extremity, or from point to point within it, as convenience should dictate.

If, then, before 1807, these parties had applied for grants of the tide-way, they could have been issued upon the principle of continuing the line of division as the devisor had designated it for the upland. As matter of absolute power, this is not question-

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able; as matter of consistency with rights on the shore, it would be defensible. Test it by the import of the will. It is that his son Nicholas shall have the land south of this point, and all the possible benefit of acquiring the tide-way attached to that land; and his son Peter should have a similar right north of that point. The shore line terminates there. The nearest line to the extremity of the tide-way is along this line of Stuyvesant street continued.

Such an apportionment would also have been equitable, as I shall, under another head, attempt to show. If equitable and just, then, without saying that the corporation could not have granted by some other arbitrary line, we, at least, may say that a grant according to this line would be a union of legal right with equitable principles.

IV. The next subject of consideration is the right of Peter G. and Nicholas W. Stuyvesant under the Act of April 3, 1807. (Session Laws, 1807, p. 125.)

That statute had two great objects in view. The first, and the principal, was to establish a uniform system of avenues and streets within certain limits; the second was to give to the corporation, for public purposes, the right to certain lands under water.

My consideration of this act leads to the following conclusions:—

1. The statute itself, and the map made under it, define the limits and the operation of the act as relates to streets, to the land along the shore of either river, viz., high water-mark. It did not profess to extend, and did not extend into the rivers below this mark at all; and no rights below such mark were of necessity regulated, in extent or mode of enjoyment, by such statute or map.

The fourth section gave authority to the commissioners to lay out streets, roads and public squares within that part of the city to the northward of a certain point commencing on Hudson River; thence running, in a manner and through streets specified, to the East River.

By the 8th section, their proceedings and the maps to be made were to be final and conclusive, with respect to persons and lands within the boundaries before mentioned.

The commissioners say, in their "Remarks," that all the streets (except 1st and 2d streets, which ran into North street) extend

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eastwardly to the East River; and all the streets from 13th street northward extend from river to river, except where they are interrupted by public squares or places.

Upon the map filed under the statute, and as to streets and avenues near the property now in question, the First Avenue was established along the whole shore; Avenue A ran up to a point a little beyond 16th street, and there terminated in the river; Avenue B ran to a point between 18th and 14th streets; Avenue C terminated between 12th and 13th streets, and Avenue D near the south side of 12th street: all in the river.

A market place was laid down to the south of 9th street, which interrupted the lines of these avenues, except the First; but by subsequent statutes, of April 11, 1815, and January 22, 1824, this was discontinued, and the avenues and streets continued through it. It may also be noticed, that at a point nearly opposite the south end of Blackwell's Island, Avenue A was resumed, and continued until it ran into Harlem River; and Avenue B was resumed further north, and continued in like manner.

Then, it is plain, that the streets and avenues, in connection with this property, ran into and terminated at the river, and at high water-mark. The office of the commissioners being fulfilled when the map was filed, their powers expired; and the laying out of streets over other ground was left to the authority possessed by the corporation, or to be governed by future legislation. I refer also to the recital in the Act of January 22, 1824, (47 Sess. vol. 6. cap. 7,) upon this subject.

It is needless to advert to the numerous acts in which legislative aid has been obtained, either to vary the map made under the Act of 1807, or to lay out avenues or streets over other property. In the last case, it will be found that resort was had to the Legislature, when the street or avenue was to be run over land still in the State. Such was the case in respect to the 11th and 13th Avenues (act 13th May, 1846; act 12th April, 1837). In the latter act, I notice the express provision for extending the streets from their terminations on the map of 1807, down to the 13th Avenue.

2. It follows from this view, that if the Act of 1807 had not conferred upon the corporation any land under water beyond the tide-way, that body could have made, and could only have made,

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an exterior street or bulkhead along the low water line from about Corlear's Hook; or, at furthest, a street of seventy feet wide at the extremity of such line as it ran, and outside of it. But consistently with their powers, and with their frequent practice in colonial days and afterwards, below Corlear's Hook, they could have done this.

3. But the statute and the commissioners' grant under it, did vest in the corporation the fee of a strip of land, four hundred feet below low water-mark, for two miles from the point of termination under the Montgomery Charter, along the shore of the East River. No one contests the proposition, that the mere naked fee in this parcel of land under water passed to the corporation by the 15th section. Whether it should be in legal language defined as a qualified fee, or in trust, is a point of little moment to determine.

4. The operation of this 15th section of the statute was to establish, as the exterior line of the city, this line of four hundred feet from low water.

The corporation could have laid out an exterior street along the said line; could not have gone beyond it in any part to attain regularity; and of course could have laid out streets as they thought best in any direction within it.

As the Act of 1807, in the provisions for laying out the avenues, did not comprise or extend to this space under water, it follows that the corporation either had no power to lay out streets over it, (a proposition not to be admitted in the premises,) or had the authority under the general powers as to laying out streets vested in them.

Besides, the object of the grant being to enable them to run out wharves and piers, reasonably implies a power to make streets. Indeed, it may be noticed that South street was as often termed a wharf as a street, in old grants.

Again, it appears that the corporation claimed such a power. In the memorial presented by them to the Legislature in February, 1826, they state, that they had found it impossible to conform the regulation of that part of the city to the line of the grant from the Legislature; and that they had been obliged to make an exterior street, called Tompkins street, and other streets in conformity thereto.

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The line of the grant certainly means the outward line of four hundred feet.

I may here re-state the proposition that the corporation had power to lay out streets all through this piece of ground under water, with a view to its future regulation, without the least regard to the system of the commissioners of 1807. I am speaking, of course, of what they could lawfully have done, not as to what expediency might dictate should be done.

5. The phrase in the 15th section, defining the land to be granted as being contiguous to, and adjoining the lands of the Mayor, Aldermen and Commonalty within the said City of New York, is to be understood as meaning the tide-way. I cannot accede to the proposition of counsel, that if any portion of such tide-way for a given distance had been granted by the corporation prior to the act, the grant by the State would have been so far inoperative, and the land would have remained in the State. On the contrary, I think the phrase was only intended to define the line of boundary, without any regard to the fact whether the ownership existed still in the city, or had been granted away.

6. With respect to the qualification of an absolute fee with all its attributes, which arises from the proviso in the 15th section, it is, perhaps, true, that the corporation was not under a legal obligation to sell to any one, at any time, but might use and improve the property for their own account, filling it up, and running wharves and piers, as they did to the south of Corlear's Hook.

[The learned Judge proceeded to examine the question, who were "proprietors of the land adjacent," within this 15th section. He held, they were, 1. The owner of upland, when no grant of tide-way had been made. 2. If the tide way had been granted to such owner, and he had conveyed it, then his grantee. 3. And the upland owners, when the corporation had granted the tide-way to another, after the act. It will be seen, in the opinion at General Term, that two of the Judges were not satisfied with the accuracy of some of these propositions, and considered that the case did not require their decision.]

We are next to examine the conveyances and grants of the parties, and of the corporation, between the Act of 1807 and that of 1826.

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[The several grants of the corporation, and of Nicholas W. and Peter G. Stuyvesant, stated in the foregoing report of the case, were then detailed, and the Judge proceeded.]

These conveyances, grants and proceedings present this striking case: That Nicholas W. Stuyvesant obtains, in 1810, a grant under water, which, upon any possible construction, was adjacent to his upland, and running to the whole extent of the right of the corporation, and somewhat beyond it. This is obtained without remonstrance from Peter G. Stuyvesant—nay, with his tacit acquiescence down to 1825. And this adopts and pursues the line of Stuyvesant street, continued, as a boundary. We have next Peter G. Stuyvesant selling all his title as upland owner to Flack and Gouverneur in 1825, and these owners, in the same year, taking a grant of land under water, down to the extreme limit of the right, and down to what they anticipated would be sanctioned. This grant is taken, adopting the same line of Stuyvesant street, continued, as its boundary; and this is submitted to, without objection, by Nicholas W. Stuyvesant, until at least 1832, when he conveyed. We have again N. W. Stuyvesant making a grant, in 1832, of all the water-lots, or land under water, including the land granted in 1810, with all his rights to any future grants by the corporation in front of the premises; and this conveyance pursues the line of Stuyvesant street.

Now, the case of *O'Donnell v. Kelsey* may be considered, at least, as settling this proposition, that the acts and acquiescence of parties may be treated as fixing a conventional line for the division of water rights, where it is just in itself, and does not violate either a provision of a statute or a rule of law. (4 Sandf. Sup. Ct. Rep. 206; Selden's Notes of Cases, Court of Appeals.)

But I do not wish to rest my decision upon this point, although it is not without great weight. I place it upon two grounds, viz., that the corporation had the right to make the grants as it did make them; and that every principle of a just and equitable apportionment between the parties, prescribed and sanctioned that division which the grants pursue.

It is impossible to say that the corporation was under an imperative obligation, after 1807 or 1826, to make its grants of land under water according to the lines of the streets. This proposition cannot be sustained. To accommodate those grants to such lines

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was a matter of wise and expedient municipal regulation. It cannot be regarded as of any higher nature.

If they had the power to grant in a different manner than by the streets, then it was equitable to grant according to the just rights of the parties, as tested by an equitable division among them. And then, if in these grants there has been a union of the exercise of unquestioned power with the observance of a true equity, it would seem impossible to overthrow them.

Now, that Flack and Gouverneur were owners of adjacent shore land, at the time of their grant, down to Stuyvesant street, is indisputable. That N. W. Stuyvesant was the owner, in 1810, of the remaining adjacent shore land, and that his actual right in part, and his right of acquisition for the rest, for the whole strip up to Stuyvesant street went to Bliss, is equally clear. And the grantees of Bliss eventually obtained what Stuyvesant gave them the right to acquire. I cannot find room for a single doubt as to the question of power.

It remains, then, I think, to ascertain whether such a division, as was thus apparently and in the instruments effected, was an equitable apportionment, and such as a Court should uphold. I think, however, that this point may be best considered, after making the few observations I propose to make under the next head.

V. The Statute of February 25th, 1826, gave, in its first section, an extension along the East River from the termination of the two miles given in 1807, and of four hundred feet from low water; and the second section formed a new exterior line. That section was altered and repealed by an act, of April 13, 1826, which provided as follows: That Tompkins street, along the East River, as laid out and approved by the Mayor, Aldermen and Commonalty of the City of New York, shall be the permanent exterior street on the East River between Rivington street and 28d street; and that all grants made and to be made, by the said Mayor, Aldermen and Commonalty, shall be construed as rightfully made to extend thereto; "and that all the provisions of the act entitled 'An Act to reduce several laws relating particularly to the City of New York,' passed April 9, 1818, and the several acts amendatory thereof and in addition thereto, shall be construed to apply to said Tompkins street." (Sess. Laws 1826, p. 155.)

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In order better to understand this act, we must advert to some previous proceedings of the Common Council.

The memorial of that body, upon which it was passed, set forth, that owing to the flat and low land, the uncertainty of the time of high water, the undulations of the shore and other circumstances, between Grand and 23d streets, they had found it impossible to conform the regulation of that part of the city to the line of the grant from the Legislature, and that they had been obliged to make an exterior street, called Tompkins street, and other streets in conformity thereto; and they asked a confirmation of their proceedings.

The grants before stated, made in 1824 and 1825, were perfectly operative and valid, as against the corporation, down to the extremity of the four hundred feet. They were inoperative as against the State, for all the space beyond it, down to Tompkins street. But I presume, upon a familiar rule of law, they would have precluded the corporation from claiming title to that excess, had the title been subsequently expressly vested in them by the Legislature.

No such title was vested; but the statute operated to transfer to the previous grantees the space, down to Tompkins street, directly from the State.

The corporation, in the cases of these prior grants, having assumed to convey down to Tompkins street, the State ratified their act, as if they had lawfully possessed the power. In any view, the statute took effect—either from its passage, as a grant, or from the date of the conveyance, by the corporation, as a confirmation.

But the statute also referred to grants to be made in future. It operated in a similar way. The grant, down to the limit of the four hundred feet, took effect as a conveyance of the soil by the owner. Beyond that, it took effect as a virtual grant or confirmation by the State to the grantee.

I am thus brought to the question, whether a division between the owners which should adopt the line of Stuyvesant street, as the dividing line between them down to Tompkins street, would be a just and equitable one.

It may be here observed, that in the complaint of Dr. Nott—in the answer of Thayer and Flagg, and in that of the corporation—the proposition is stated and admitted, “That the plaintiff, and

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those claiming under Nicholas W. Stuyvesant and Peter G. Stuyvesant, now stand in the same legal relation to each other as they, the said Peter G. and Nicholas W. stood, when owners of the said premises."

I do not mean to say that any of the parties are bound by this statement, as they would be by an admission of a matter of fact; but I consider the proposition as one of indisputable truth, and full of important consequences.

Then the simple mode of viewing the subject is this: Suppose Peter G. and N. W. Stuyvesant had applied together for grants, after the statute—viz., in March, 1826—and that the corporation had granted to them the whole parcel down to Tompkins street, as tenants in common—how should a division have been made between them?

Their devisor had brought the line of their possessions down to the shore by the boundary of Stuyvesant street; and it would be a natural suggestion to continue such line, if it was an equitable one, in the same direction.

This street was one of the streets laid down by Stuyvesant, in the same manner as numerous streets were laid down by individual proprietors in New York. So late as March, 1831, it was recognized as a public street by that name, or such other name as the Common Council might determine, from the Bowery to the Second Avenue. (Sess. Laws, 1831.)

[The Judge proceeded to consider the rules for the division of lands under water, and cited and examined the following authorities:—*Deerfield v. Arms*, (17 Pickering, 41;) *Duranton*, (*Droit Francaise*, tome 4, p. 424;) *Touillier*, (*Droit Civil Francaise*, tome 3, §§ 155, 156;) *Emerson v. Taylor*, (9 Greenleaf, 142;) *O'Donnell v. Kelsey*, (4 Sandf. S. C. Rep. 206.) The resolution of the corporation of April 1, 1834, (Doc. Board of Assistants, p. 367.) *Reed v. The Boston Mill Co.*, (6 Pickering, 158;) *Knight v. Wilder*, (2 Cushing, 209;) *Walker v. The B. & M. R. R. Co.*, (3 Cushing, 223;) *Gray v. Deluce*, (5 Cushing, 9;) *Dawes v. Prentice*, (16 Pick. 435;) *Sparhawk v. Bullard*, (1 Metcalf, 95;) *Piper v. Richardson*, (9 Metcalf, 155.)]

After a careful examination of all that I am aware has been decided, and the views of practical men and surveyors, I think the following rules best calculated to effect a fair and legal di-

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vision among coterminous owners lying in a cove, who are to run across flats or land under water to an exterior line.

1. That a base line be run across the mouth of the cove, from point to point, and its length ascertained.

2. That the shore line be measured, as well as the length of each owner's shore line.

In doing this, the rule of the best authorities is, that if the line of the shore is varied by deep indentations or sharp projections, the measurement is to be adjusted upon the general available line of the land. Sometimes there will be a cove within the cove, at right angles to its general line at the point.

In general, where there is an indentation, the line from point to point, pursuing what would be the course if no such indentation existed, should be measured. And so, where there is a projection, the line is to be measured across the base of the projection. Slight deviations from the general line are to be disregarded. These general rules, varied by peculiar circumstances, and applied by experienced persons, will be found to meet equitably most cases that arise, and to assist in the solution of the most difficult.

3. The base line across the cove (or chord of the arc) should be considered as the line upon which the rights and proportions of the parties are to be adjusted up to the established exterior line.

It is obvious, that if the cove should be a regular half circle, it may be broken into any number of ownerships, and yet lines may be drawn to the chord of the arc without interfering with or crossing each other, or touching upland. The ratio of a diameter to a circle being about 7 to 22, that of the chord of a half circle is as 7 to 11. Each owner, for 11 parts on the shore, would have 7 on the base line.

And again, many coves are capable of being reduced, without injustice to any one, to a nearly regular half circle. One of Mr. Ewen's maps, in the present case, shows this with clearness.

4. The shares in the base line being thus established, divisional lines, run from the points of the owners on the shore, give each his own proportion of the land within the cove; and the shares on the base line fix also the ratio and basis upon which the shares of the exterior line are to be computed.

There is scarcely a rule ever suggested by which the apportion-

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ment by the line of Stuyvesant street will not appear equitable. By the mode best sanctioned by authority, it is singularly so. I have caused a map to be made and annexed hereto, showing my results, and illustrating the following statements: Take each owner's line of the shore, and divide, upon the base line of the cove upon Map No. 1, from the very marked points upon it, viz., Burnt Mill Point and the projection on the corporation land. The shore line of N. W. Stuyvesant is 1975 feet, of Peter G. Stuyvesant, 2680 feet, (it may be noticed that the grant to Flack and Gouverneur make this line 2600 feet,) and the corporation line, measured on the arc of the large inlet on the north, is 763 feet; the whole shore line being 5418 feet. The base line up to Stuyvesant street is 1485 feet;—to 28d street continued, 1846; and from there to the extremity, 755 feet; making together 4086 feet. On these data, N. W. Stuyvesant should have 1489 feet on the base line, and gets 1485; P. G. Stuyvesant should have 2021, and gets 1846; and the corporation, 576, and gets 755.

Divide the excess of the line taken by the corporation between Nicholas W. and Peter G., and Peter G. would have on the base line 89 feet more than he actually takes.

Next establish the right on Tompkins street, upon the hypothesis of the right on the base line across the cove, controlling it: N. W. Stuyvesant should have 1553 feet, and has 1575; and Peter G. should have 1932, and has 1910.

Again, test the division by a comparison between the shore line and the line of Tompkins street, and the result is, that N. W. Stuyvesant should have received an extent of 1479 feet, and gets 1575, a difference of 96 feet; and Peter G. Stuyvesant loses so much.

It will be seen by the same map, that the area of P. G. Stuyvesant's land down to the base line (or chord of the arc) is 871 lots of ground and a fraction, and that of N. W. Stuyvesant 411 lots and a fraction. But, by continuing the line to Tompkins street, N. W. Stuyvesant gets 269 lots, and Peter G. 118; so that the difference, then, is 309 lots in favor of N. W. Stuyvesant, to make an equal division between them. But it is proper to consider their rights, in this particular, as connected with the whole right of the shore line down to Ninth street. It will be seen that a line of 950 feet, nearly parallel with the shore line, is drawn on

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the map, which brings the line opposite to the north side of Ninth street. The area of this strip is 208 lots; thus leaving about 100 lots of difference. The triangular piece, gained by N. W. Stuyvesant in consequence of the running by the lines of the streets, will diminish this to about 60 lots.

This result, upon a division of about 2000 lots of land, is not a little surprising.

The division, being thus equitable, is followed up by the grants actually conforming to it. These have been before stated at length.

On what ground should they be interfered with?

Had not the corporation the right and power to grant the soil under water, in the manner they did? To suppose otherwise, is to assume that they were under a legal obligation to grant only according to the line of the streets, and that a grant in any other mode would be illegal.

The Court is asked to set aside or modify grants actually made, and in pursuance of an equitable adjustment of rights, because not made in obedience to an assumed law binding upon the corporation. I do not find that such a law exists; nor any necessity, in the case, for such a division as is claimed.

It amounts to this: Because 15th street, laid out for the public regulation of the city, strikes the point of division of the farm at high water, viz., at Stuyvesant street; therefore, the line of division of all right to land under water, beyond it, must be settled by the line of that street continued. All equitable allotments of the land are superseded; all previous grants of rights or privileges are annulled; and a municipal regulation is to have the effect of sweeping away some acres of ground from one, and of transferring them to another, when imperative law does not command it, and equity and fairness forbid it.

Next, Flack and Governeur, having thus acquired all the right of Peter G. Stuyvesant, and having got the full right to the extent which the corporation could then convey, could have disposed of the property under water exactly as they could have conveyed the property on the upland. If they sold a strip within the exterior line, touching the upland, the grantee took it just as granted, and all right attached to a shore ownership, if not expressly reserved, was superseded. If they sold down to the ex-

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terior line, that grantee took just what was given to him, and he took the benefit of a future accession from the State or city.

The grantee of a strip on the shore acquired nothing but what was comprised within the limits of his deed, if he did not bound on Tompkins street. Each intermediate grantee acquired what was within his deed, and no more. The grantee who bounded on Tompkins street, and he alone, may perhaps take a pre-emptive privilege to any future extension, if the State should grant such extension with a pre-emption attached to it.

VL The last subject of consideration, was the effect of the Act of the Legislature of the 11th day of May, 1835, upon the questions in the case, and the rights of the parties.

It will be noticed, that the complaint in the suit of *Nott v. Thayer* and others sets forth that Thayer and Flagg had applied for a grant of land under water which reaches to Avenue D, (and which comprises land running further into the river than the exterior line of Tompkins street;) that the proper committee was about to report in favor of such grant; and the corporation state in their answer that they are advised these defendants are entitled to such grant. These defendants insist upon their right to these four parcels, which are marked "Thayer and Flagg" on Map No. 3. Whatever title Smith's estate had to these parcels, is conveyed to them by their deeds of the 9th of April, 1850.

On the other side, the plaintiff, Nott, asks in his complaint that he be declared entitled to the grants of these parcels whenever made by the corporation; and that Thayer & Flagg be prohibited from receiving them.

So it appears that a grant for a considerable parcel, beyond Tompkins street, has been prepared and approved by counsel, to be given to Campbell & Moody, extending from 19th to 20th street, and from the easterly side of Tompkins street to the easterly side of Avenue D; but the Comptroller has refused to deliver it; and further, that the Gas Light Company have received a grant of a parcel opposite their premises, between 21st and 22d streets, also extending to the eastward of Tompkins street.

The counsel of the corporation, upon the trial, has submitted these questions to the Court; asking, however, as I understand him, that the operation of the Act of 1835 should be adjudicated;

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and he has suggested a doubt whether that act does really confer any right of soil, or power to convey any such right, upon the Corporation.

It is clear, upon the principles I have previously stated, that, as between the plaintiff, Nott, and the other parties, no one of the latter could have any right to either of the parcels lying south of the centre line of Stuyvesant street continued, and easterly of Tompkins street, except the most northerly triangular strip. The line of Tompkins street being the new base upon which rights to further grants should be adjudged, and the lines then regulated by the streets, it is obvious that the plaintiff, Nott, would be entitled to the parcels, with the exception noticed. And again, as Francis Griffin's estate is the owner, on Tompkins street, of the strip between 18th and 19th streets, acquired as early as 1846 and 1848, that estate would be entitled to the triangular northerly piece before mentioned.

But, after much consideration, I am unable to see how the Corporation has any power to make a valid grant of land under water beyond the limit of Tompkins street. I cannot, therefore, adjudge, either that the Corporation be at liberty to consummate the grant to Thayer and Flagg, or judicially to pronounce in favor of the demand of the plaintiff, Nott, in relation to any of the ground under water easterly or outside of Tompkins street. My views and reasons are these:—

On the 12th day of November, 1832, Benjamin Wright, the street commissioner, made a report to the Common Council of a plan for the permanent regulation of that part of the city lying between 14th and 23d streets, the Third Avenue and the East River. (Document 32, Board of Assist., vol. 2, p. 228.) This report was read in evidence, and it states the line of a bulkhead as the line to be fixed southwardly down to 15th street, thence eastwardly along 15th street to Tompkins street, and thence along Tompkins street, as before established. This line is described as running along the edge of the flats, and may be seen on Diagram No. 3. It was, with a trifling exception, inside of Tompkins street.

On the 8th of February, 1833, a resolution, which had passed both boards, was approved by the Mayor, resolving that the plan recommended by the street commissioner, under date of Novem-

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ber 12, 1832, as delineated on a map accompanying such report, be adopted, whenever the parties holding water grants between 15th and 25th streets shall enter into legal covenants in relation to their surrendering their present grants, which are bounded by Tompkins street, and taking out new ones bounded by the new line proposed as the exterior line of the city, and depositing the same with the street commissioner. In February, 1835, a memorial of the Corporation was presented to the Legislature, the contents of which are sufficiently set forth in a report of a select committee of the Assembly of the 22d of April. It stated, that by the present plan, the exterior line of an eastern section of the city requires the displacing of a great extent and depth of water; and immense quantities of earth would be necessary to fill up the space between the shore and a bulkhead corresponding with said line, the expense of which would be inexpedient; and prayed that a law might be passed, granting authority to arrange, regulate and alter in such manner as they may hereafter decide upon, the map of the city between 18th and 23d street, the First Avenue and the East River. The committee recommended that the prayer be granted, and introduced a bill for that purpose.

This led to the Act of May 11, 1835, the provisions of which are merely these: "That it should be lawful for the Mayor, etc., to adopt such plan as they might deem expedient for regulating and laying out that part of the city which lies between 18th and 23d streets, the First Avenue and the East River; and to designate and direct where the permanent exterior line or street, eastward of such part of the said city, shall be, in place of that part of Tompkins street which now lies or is laid out to the eastward thereof on the present map or plan of the city.

"Such plan as may be adopted for the regulation and laying out of the above-mentioned part of the city, or for the permanent exterior line or street thereof, shall become and be deemed in law as part of the map or plan of the said city." (Sess. Laws, 1835, p. 309.)

Soon after the passage of the act, and by a resolution approved the 30th September, 1835, the Common Council resolved that the plan reported on the 12th of November, 1832, by Benjamin Wright, be adopted, and the exterior line or street there laid down be approved of according to such plan: provided, that the grant

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of the 1st of August, 1825, to Flack and Gouverneur be surrendered and cancelled, according to the terms of a certain instrument between A. M. Bruen and Matthias Bruen and the Common Council, dated the 11th of April, 1835, deposited with the street commissioner. This surrender does not appear to have been made.

In relation to this Act of 1835, it appears to me that the Legislature did not intend to grant, and it cannot be construed into a grant or authority to go beyond Tompkins street.

1. The memorial, the report, the adoption of Wright's plan in February, 1833, and the resolution of September, 1835, demonstrate that the Corporation sought only, and the Legislature sanctioned only, an alteration in the map of the city, and of the exterior line as fixed by the Statute of 1826, and that such alteration was to be made within the line so fixed. .

2. It was necessary to apply to the Legislature for an alteration of the map of the city, which when once made was unchangeable, except by legislative power. This was provided in the Statute of 1807, and continued to be the law whenever new streets were laid out, or old ones varied.

3. There is not a word in the act giving a right to any soil under water beyond Tompkins street, upon any construction which the words will bear. There is not a phrase which authorizes the city to grant such other soil—nor is there a word which could operate to transfer the title of the State, either to the Corporation or to any grantee. When we examine the acts of the Legislature which profess or operate to transfer a title, we find that they may be thus classed :—

Where they expressly grant a right of soil, as in the Statute of 1807, and others; where they confer the right of the State, through the Corporation, or upon some act done by it, to individuals—such was the Statute of 1798, giving the intermediate spaces up to South and West streets to the owners, upon fulfilling the directions of the Corporation as to filling them up, and otherwise; and where they act, as the Statute of 1826 does, by vesting the grantee of the city, whose grant extends up to the limit of the 400 feet, with the land beyond it up to a new line—such was the Act of 1826 as to Tompkins street. (See also the Law of April 12, 1837, as to the Thirteenth Avenue, and that of May 13, 1846, as to the Eleventh Avenue.)

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But in every case there is something to indicate the intention to transfer the title of the people, and words legally sufficient to effect such transfer. In order to conclude that the Corporation have the power under this Statute of 1835, we must conclude, as matter of law, that the power to change the map in a certain particular, passed expressly without the slightest view of granting new land, is to operate as a conveyance of the large space now claimed, without a word similar to what the State has always employed to transfer its title.

I am brought to the conclusion, that the establishment of the exterior lines as proposed in the ordinance of July 8^d and of November 27th, 1850, was wholly unauthorized, and that the grants of the Corporation, for any strip beyond Tompkins street, would be invalid.

The result, therefore, is, that I adjudge the rights of the parties upon the basis of Tompkins street being actually the exterior street of the city, at all the points involved in this controversy.

A judgment was entered in conformity with that opinion. It is unnecessary to give the details of the judgment. The points decided sufficiently appear in the opinion, and the modification thereof in the statement of the decision of the General Term.

From the judgment at Special Term, appeals were taken as above stated.

Before the appeals were argued, the defendants Thayer and Flagg entered into some arrangement by which they ceased to press their claim, and they therefore were not represented on the argument of the appeals.

John M. Barbour and Wm. Curtis Noyes, for Eliphalet Nott.

I Under and by virtue of the grant made by the Corporation of New York to Nicholas William Stuyvesant, in 1810, the Act of April 13, 1826, the several conveyances derived from Stuyvesant, set forth in the pleadings and evidence, and the release of quit-rent executed by the Mayor, etc., of New York, Eliphalet Nott is the owner in fee simple of all the lands 228 feet in width, bounded by the centre of Stuyvesant street on the north, and ex-

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tending from high water-mark to Tompkins street. (Act of 1807, 5 Laws N. Y., 180; Act of 1826, 7 Laws N. Y., 155 b.)

First.—The grant made by the Mayor, etc., of New York to Stuyvesant was valid, and vested in him a perfect title to the lands covered thereby.

a. At the time the grant was made, the Corporation of New York was the owner in fee simple absolute of all the land in front of both the Bowery and Petersfield farms, between high and low water-marks. (Kent's City Charter and notes, pp. 16, 143, 161, 175, 197; *Mayor v. Scott*, 1 Caine's R. 544; *Furman v. Mayor*, 5 Sandf. 16.)

b. The Corporation, being the owners of the tide-way in front of both farms, had power to grant the 400 feet strip lying outside of low water-line to any person whatever; notwithstanding the proviso contained in the Act of 1807. (*Furman v. Mayor*, 5 Sandf. 16; *Gould v. Hudson River R. R. Co.*, 2 Seld. 522; *Mayor v. Scott*, 1 Caine's R. 544; Davies' Laws N. Y., p. 1227, n.)

c. If, however, the term "adjacent owners," as used in the Act of 1807, was intended to include the owners of the uplands above high water-mark, and to give them the pre-emption of the 400 feet strip, then the grant to Nicholas William Stuyvesant, in 1810, was rightfully made, and vested in him a perfect title to the premises covered thereby.

1. A boundary upon the line of Stuyvesant street, constituted an equitable division of grants to Peter G. and Nicholas William Stuyvesant. (*Rush v. Boston Mill Corporation*, 6 Pick. R. 158; *Sparhawk v. Bullard*, 1 Metc. R. 95; *Emerson v. Taylor*, 9 Greenleaf R. 42; *Deerfield v. Arms*, 17 Pick. 41; *Gray v. De Luce*, 5 Cushing's R. 10.) 2. Stuyvesant street constituted a natural and proper line of division. (*Stuyvesant v. Underwood*, 19 John. 181.)

Second.—By the Act of 1826, the grant made to Stuyvesant by the Corporation, in 1810, was extended to Tompkins street. (7 Laws N. Y., pp. 48, 155; Davies' Laws, 777.)

Third.—At the time of the commencement of these actions, Dr. Nott was the owner, under conveyances derived from N. W. Stuyvesant, of the lands so vested in N. W. Stuyvesant, by the grant of 1810 and the Act of 1826.

II. The grant made by the Corporation to Hezekiah Bradford, in 1844, was valid; and Dr. Nott is now the owner of the prem-

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ises covered thereby, under conveyances derived from Bradford.

III. The grant made by the Corporation to Dr. Nott, in 1848; and the Act of 1826 vested in him the title to the premises bounded by high water-mark, 14th street, Tompkins street and 13th street.

IV. Whether Dr. Nott is, or is not, the owner of the premises extending from the shore to Tompkins street, and bounded on the north by Stuyvesant street, none of the parties to these actions are entitled to claim as against him, under or by virtue of the grant made by the Corporation to Flack and Gouverneur, for that grant is, under the facts in evidence, void by its terms.

V. The street designated upon Diagram No. 3, as "The exterior line of the East River, adopted by the Common Council, July 3, 1850," is the exterior street of the city, opposite the premises which are the subject of the controversy in this action. (Laws of 1835, p. 309; Davies' Laws, 782.)

VI. The exterior street, so authorized by the Legislature, in 1835, and laid out by the Common Council, is subject to all the provisions of the Acts of 1798 and 1813. (2 Laws N. Y., p. 244, §§ 220 *et seq.*; Act of 1798, Davies' Laws N. Y., p. 396.)

VII. The owners of lands upon Tompkins street, under grants from the Corporation and the Act of 1826, are, therefore, entitled respectively, and may be compelled, to fill up and become the owners of the space between Tompkins street and the exterior streets designated by the Common Council, in 1850, bounded by lines running in such a direction as will give to the several owners of lands upon Tompkins street their respective proportions, according to the breadth upon Tompkins street of their several lots; and are also entitled to build piers in front of their premises on such exterior street, whenever required to do so by the Common Council, and to receive the wharfage thereof.

VIII. The line between the lands which Dr. Nott and the plaintiffs in the second suit are respectively entitled to fill up, will run from the westerly side of Tompkins street, about at right angles with that street, and more northwardly than the line of Stuyvesant street.

J. Larocque and Greene C. Bronson, for A. Belmont and others,
plaintiffs in the second suit.

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I. Flack and Gouverneur, from whom Belmont and others derive their title, were the proprietors in fee of the uplands adjacent to the waters of the East River, between 17th and 19th streets, at the time they obtained their water grant, in 1825; and Belmont and others are the proprietors in fee of the lands granted to Flack and Gouverneur, between 17th and 18th streets, Avenue A and Tompkins street, and between 18th and 19th streets, the 1st Avenue and Tompkins street. The water grant to Flack and Gouverneur, in 1825, included the shore or tide-way, as well as the four hundred feet and other lands, to Tompkins street.

II. As such proprietors, Belmont and others have the pre-emptive right to all the lands under water between 17th and 19th streets, and the permanent exterior line of the city, so far as those lands have not already been granted to the persons under whom they hold. This involves the question, how the water grants should be laid out; and we say they should be so laid out as to extend into the river in the direction of the streets.

III. The statutes on this subject cover both the east and the west sides of the island, and can only be properly executed by proceeding upon a general and uniform plan in laying out all the water grants on both sides of the town. (Kent's Charter, p. 85, § 87; id. p. 87, § 88; 5 Webster's Laws, 125, Act of April 3, 1807, § 15; Laws of 1826, p. 48, Act of Feb. 25, 1826; id. p. 155, Act of April 13, 1826; Laws of 1835, p. 309, Act of May 11, 1835; Laws of 1837, p. 166, Act of April 12, 1837; 2 Rev. L. 1801, p. 126; 2 id. 1813, p. 432; 1 Greenl. p. 284, Act 9, 1786, § 18; 1 Rev. St. p. 208, §§ 67, 8, 9.)

IV. The provisions in relation to water grants are connected with the provision for laying out streets and avenues, both objects being specified in the Act of 1807; and it was evidently the intention of the Legislature that the upper part of the island should be laid out upon a uniform plan, including the lands then under water, which, when reclaimed, would constitute a part of the city.

V. The rights of the riparian owners are governed by the principles of law, and not by any supposed discretion in the Corporation to lay out water grants at pleasure. The words of the Act of 1807 are, "the proprietor or proprietors of the lands adjacent shall have the pre-emptive right in all grants made by the Cor-

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poration of the said city of any lands under water granted to the said Corporation by this act."

VI. For the purpose of giving effect to the statute and securing the rights of all parties, it is plainly necessary that the Corporation, in laying out water grants, should proceed upon a general and uniform plan—one which includes all the waters and all the proprietors, and gives every one his just share with reference to such plan.

VII. If the question is considered independently of what has actually been done by the commissioners and the Corporation, under the Act of 1807, it will be impossible to uphold this judgment. It is evident that the Legislature intended that the upper part of the island should be laid out upon a general and uniform plan. By coupling the provision for water grants with that for laying out streets, it must have been the intention of the Legislature that the plan of the city should include the lands to be reclaimed from the rivers, as well as the uplands. Without such a plan, one of two things must inevitably follow—either all of the waters will not be granted, or some proprietors will get more than their just share of the property. The lands to be reclaimed were to constitute part of a great commercial city, and for that reason were to be laid out upon a general and uniform plan.

The facts that the Stuyvesants owned a large quantity of upland, and that a part of it was situate on a cove, does not exempt them from the rules of apportionment which govern in the case of other and less extensive proprietors. The laws in question are alike applicable to all, and entitle every one to water grants in proportion to his possessions on the shore, whether great or small. And the cove was to be blotted out by making a new water front on the river. The only practicable mode of executing the statute, is that of starting from the two points where the lines of each proprietor touch the shore, and from thence running parallel lines into the rivers. The direction in which the lines of any riparian owner reach the shore does not govern the direction of the side lines of the water grant. The proper breadth of any water grant is not controlled by the figure or quantity of the adjacent upland, but by the front on the river, and a general plan of laying out all the grants. The proper direction of running the side lines of any grant into the river does not depend upon the direction of the

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shore at any particular place, nor upon its sinuosities, whether small or great. Neither the right to, nor the proper extent or form of a water grant depend upon the question, when or from whom the riparian owner obtained his title. All are governed by the fact of ownership at the time the grant is made, the extent of the proprietor's line on the shore, and a general plan which divides all the water to be granted among all the riparian owners. Aside from what has actually been done under the Act of 1807, the form of the island, and the object which the Legislature had in view, (the building of a great commercial city,) left no room for doubt about the proper mode of laying out streets and water grants. The general course of the island, from north to south, corresponds with the general course of the North and East Rivers, and that is the proper base line from which to run perpendicular lines in laying out the city, including water grants on both sides of the island. This is the only plan which is adapted to the form of the island. It is the only plan which will secure uniformity in laying out the town, including the portion to be reclaimed from the two rivers. This plan secures more perfectly than any other the public convenience and the rights of all the riparian owners. This plan, which agrees precisely with what has actually been done in laying out the town, gives us the lands which we claim. If the water grant to Bradford, under which Nott and Lowber claim, had been made before the commissioners' map was filed, it could not be upheld to an extent which would affect Belmont and others whom we represent.

VIII. But the grant to Bradford was not made until 1848, nearly forty years after the commissioners' map had been filed, and after Francis Griffin, under whom we hold, had acquired title between 17th and 19th streets; and whatever doubt there may have been before the commissioners had completed their work, that doubt must be removed by what has actually been done by the commissioners and the Corporation, in laying out the town, including water grants. The commissioners have carried out the intention of the Legislature, by laying out regular streets and thoroughfares, on the plan best adapted to the form of the island and the object in view. The map of the commissioners is by law final and conclusive upon the Corporation, land owners, and "all other persons whomsoever." (5 Webster, 125, § 8.) The Corpor-

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ation has also borne its part in carrying into effect the intention of the Legislature, by continuing the streets and avenues into the rivers, in their direction on the upland, as laid out by the commissioners, and making water grants in conformity with the general plan, running parallel lines into the rivers in the direction of the streets. The proper mode of laying out water grants had thus been settled by a practical construction of the statutes for nearly forty years before the grant to Bradford was made, and it was then quite too late to depart from that construction.

IX. If the Corporation was not bound by law to make water grants in conformity with the commissioners' plan of the town, still, the provision that the adjacent proprietors should have the pre-emptive right to all the waters granted to the Corporation, necessarily implied a just division between them, and this could only be effected by laying out the grants upon some general plan; and after the Corporation had settled and acted upon that plan for more than thirty years, it was quite too late to depart from it in making the grant to Bradford.

X. If the statutes in question are regarded as containing nothing more than an authority to make water grants to adjacent proprietors, the Corporation, before making the grant to Bradford, had, by a long and uniform practice, settled the plan of making a just and proper division among the proprietors, and was not afterwards at liberty to depart from that plan.

XI. Whether the learned Judge was right or wrong, in relation to the proper apportionment between riparian owners of flats between high and low water-mark, under the Massachusetts ordinance of 1641, or in relation to the proper division of islands formed by alluvial deposits in a river, he clearly erred in applying those rules to the apportionment of water grants under the New York charter and laws, which are to be made for the purposes of commerce and as part of a great city.

XII. The principles which govern the rights of riparian owners, in relation to the four hundred feet granted to the Corporation by virtue of the Act of 1807, are applicable to the lands under water lying between the four hundred feet and Tompkins street. (Laws of 1826, p. 43, § 1, and p. 155, § 1; 2 R. L. 432, §§ 220, 221, 222.)

XIII. The grant made to Bradford in 1848, under whom the

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defendants, Nott and Lowber, claim, so far as it includes lands lying north of 17th street, is void. (1.) Because it was made without authority, and in derogation of the legal rights of others. (2.) It was also void by force of the express condition in the grant.

XIV. It is wholly unnecessary to inquire whether the Corporation, either prior or subsequent to the Act of 1807, was under any obligation to make grants to riparian owners of lands between high and low water-mark, which were vested in the Corporation by its charter. It is enough, that they have actually granted the tide-way, and far beyond it, to the persons under whom Belmont and others derive title.

XV. It is also unnecessary to inquire whether the Corporation can in any case be compelled to make water grants. It is enough for our present purpose to say, that when the Corporation does make water grants, it must be done upon established principles; and that the grant to Bradford, so far as it cut off a part of our front as adjacent proprietors, cannot be maintained.

All that we ask is, that the grant to Bradford, so far as it conflicts with our rights, should be declared void, and the defendants, Nott and Lowber, should be enjoined from placing any obstructions in the river, in front of our property.

The Corporation is ready and willing to grant to Belmont and others, in accordance with their claim, so soon as the injunction against making it is dissolved, and the principle of apportionment is settled.

XVI. The water grant to Nicholas W. Stuyvesant, in 1810, does not affect our claim.

XVII. The learned Judge, before whom the cause was tried at the Special Term, erred in deciding that the Corporation was not authorized, under the Act of May 11, 1835, to lay out an exterior street to the eastward of Tompkins street, and that that act could not be construed into a grant or authority to that effect, and in adjudging the rights of the parties upon the basis of Tompkins street being actually the exterior street of the city.

XVIII. The Court, at Special Term, erred in deciding that the Corporation of New York has not now, and never had any power to make a valid grant of land, under water, beyond the limits of Tompkins street.

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XIX. If, therefore, the Corporation have the right to make grants beyond Tompkins street, the plaintiffs are entitled to all the land under water between 17th and 19th streets, beyond Tompkins street, and out to the new exterior limits of the city. But if, as held by him, the Corporation have not now the right to make grants beyond Tompkins street, it is submitted that the learned Judge, who decided the cause at Special Term, committed a palpable error in deciding in advance who would be entitled to those grants, when the Corporation should receive from the State the power to make them.

XX. The learned Judge also erred, even upon the principle adopted by himself, in extending the line of Eliphalet Nott upon Tompkins street to the southerly side of 18th street, and limiting our southerly extension upon Tompkins street to the southerly side of 18th street.

On the contrary, the line of Stuyvesant street strikes the easterly line of Tompkins street at a point considerably below the southerly line of 18th street.

XXI. Even if the Corporation have no present right to grant beyond the limits of Tompkins street, the plaintiffs were entitled to the remedy prayed in their complaint, restraining the placing of obstructions, by the defendants, Nott and Lowber, in the waters of the East River, between 17th and 19th streets; and the Court, at Special Term, erred in not awarding that relief.

XXII. If the decision of the Court, at Special Term, that the line of Stuyvesant street continued to the easterly side of Tompkins street was to be our boundary, was correct, then the limiting them by the line of 19th street on the north was an error, and new boundaries should have been established, upon just and equitable principles, between us and the defendants owning north of 19th street, and between those defendants respectively.

XXIII. The case cannot be decided on the ground that we have lost our rights, by any supposed acquiescence in the line of Stuyvesant street continued as a proper boundary. *Adams v. Rockwell* (6 Wend. 285).

David D. Field, for defendants, Smith, Benjamin and Roberts.

I. The only grants of land under water which the Corporation

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of the City of New York has authority to make to the proprietors of the upland or shore, are grants of land extending into the river in the direction of the streets. The language used in the Acts of 1807 and 1836 is, "the proprietors of the lands adjacent shall have the pre-emption right in all grants made by the Corporation of the said city of any lands under water," etc. In the Act of 1837, the language is, "adjacent to and in front of" the lands, etc. What are the lands under water "adjacent to and in front of" the shore, is the question? We say they are the lands lying between the same streets; and for the following, among other reasons:—(1.) Such a construction is the more natural and obvious one. (2.) Such a construction most completely accomplishes the purposes of the Legislature. (3.) It has been the usage of the Corporation to make the grants conform to the streets. (4.) Since this usage began, the Legislature has made successive grants in nearly the same language, which is evidence that the Legislature sanctions this construction. (5.) This usage has become a rule of property, for subsequent purchases have been made in reference to it. (6.) Such a construction is the more equitable one. It is the one which secures a water front to the greatest number of proprietors, and the only one which does not give to some proprietors a double front and permit others to run diagonally across their neighbor's front. (7.) Such a construction most corresponds with the general course of the two rivers. It best answers to the form of the island. It is the only one which conforms to the map of the city, as laid out by the commissioners, under the Act of 1807, and established by law. (8.) It is the only construction which gives a fixed and certain rule for defining the rights of parties. (9.) Any other construction leads to embarrassment and confusion. It makes irregular lots, intersects streets, and leaves unfilled spaces inside of projecting wharves and filled lots. (10.) A different construction may lead to the disturbance of existing titles, and opening disputes as to boundaries.

II. The defendants, Smith, Benjamin and Roberts, are entitled to all grants which the Corporation have had authority to make of lands under water "adjacent to and in front of" the upland, or shore, between 20th and 21st streets. This involves two considerations—

First.—The title, independent of the two other grants.

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1. The defendants have succeeded to all the title which Peter G. Stuyvesant had, by virtue of his ownership of the upland on the 18th of April, 1825. 2. The owner of the upland is the "proprietor of the lands adjacent," within the meaning of the 15th section of the Act of 1807. If the Corporation was indeed the proprietor of the lands adjacent, the proviso was senseless. Furman's case was different, and decided on other grounds. There, the Corporation had received a grant of the 400 feet without any trust, and the decision went upon the peculiar phraseology of the preamble to the Act of 1798. (5 Sand. S. C. Rep. 38, 40, 43.) In the present case, not only is there no evidence that the Corporation had conveyed any part of the strip between high and low water-mark, but the act assumes that they did not. 3. If, however, the Corporation be regarded as the proprietor of the lands adjacent, the defendants have succeeded to their title by virtue of the grant to Flack and Gouverneur, which conveyed not only the strip between high and low water, but at least 400 feet beyond.

Second.—The title, as affected by the two other grants.

1. These are grants to which neither the defendants nor their predecessors were parties. They are unaffected by them, therefore, except so far as they may have conveyed a title superior to that of the defendants. The plaintiff claims nothing, and has nothing by proscription or adverse possession. Though the grant to N. W. Stuyvesant was in 1810, there is no evidence or claim of adverse possession under it. To affect the defendants, therefore, by these grants, the plaintiffs must show that they granted what the defendants claim, and that they granted it rightfully. 2. Those grants conveyed no title to the grantees as against the defendants. (1.) If the city had only a power, it could only be executed in favor of the shore owners. If it had the fee, it was charged with a trust in favor of the shore owners. In the latter case, if the grant to N. W. Stuyvesant had been absolute, it might possibly pass the legal estate, subject, however, to a trust in equity. But, since 1 R. S. 730, § 65, a conveyance by a trustee in contravention of the trust is void; the grant to Bradford therefore conveyed no estate, legal or equitable. (2.) The grants, both of them, show on their face that they were executed in pursuance of the Act of 1807, and that they were intended to conform to the commissioner's map of the city. The

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grant to Bradford, moreover, contains a condition making it void, if he was not the real adjacent owner. (3.) If the grant to N. W. Stuyvesant did pass the legal estate, it did not convey the equitable title. The grantee holds, in trust, for the equitable owner; and then the question is, who is equitably entitled? that is, to whom ought the Corporation to have granted? This Court can rectify the mistakes of the Corporation as between the different claimants, and settle the boundaries between them.

Third.—But it is said, that even if the defendants have succeeded to all the rights of the original shore owners, and have received no detriment from the other grants, yet that the Corporation could give no title beyond the 400 feet, and that they have exhausted that. To this there are four answers:—(1.) If that were so, it would be fatal to the claim of Dr. Nott. He has obtained a grant beyond the 400 feet himself. (2.) The Corporation have not, in fact, granted the whole of the 400 feet. (3.) The Act of 1826, by its true construction, gives the Corporation authority in its future grants to convey more than the 400 feet, and to the exterior line. It is to derive a revenue from its grants proportionate to the lands granted. (4.) If, however, it were otherwise, and the Corporation could not grant, then the defendants take, by virtue of the Act of 1826, without a grant; and the Court should revoke the grant to N. W. Stuyvesant and Bradford, so far as they interfere with the defendants' rights.

III. The acts of the Corporation, in establishing an exterior street beyond Tompkins street, were authorized by law, and are valid.

IV. The grant made by the Corporation to Nicholas Wm. Stuyvesant, in 1810, does not deprive the defendants of any of the rights which they would otherwise have, upon the principles above stated, because: (1.) That grant was improperly made in the direction of Stuyvesant street. (2.) If the impropriety of the location could not now be questioned, yet the Act of 1826, conveying the grant to Tompkins street, does not convey it in the direction of the original grant, but in the direction in which an upland owner would have to go.

V. The grant made by the Corporation to Flack and Gouverneur, does not interfere with the defendants' claim, because Flack and Gouverneur were entitled to all they received, and they do not receive expressly or by implication any right to more.

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VI. The grant made by the Corporation to Bradford does not interfere with defendants' claim, because that grant was void, so far as it made Stuyvesant street a boundary.

VII. The acts of the Corporation, in establishing an exterior street beyond Tompkins street, are legal and valid.

John D. Sherwood, for defendants, *Van Pelt, Campbell and Moody* presented the same points.

R. Busteed and D. E. Sickles, for the Mayor, etc.

SLOSSON, J.—For the purpose of the questions raised in these actions, both may be treated as one.

Thayer and Flagg being out of the controversy, the real dispute is between the plaintiffs in the second suit representing the estate of Griffin, and those deriving title through him and other owners on the north side of Stuyvesant street, on the one side, and Nott on the other; and the point at issue is, whether the parties are concluded by the line of Stuyvesant street extended to Tompkins street, which forms the southern boundary, in the grant of August, 1825, to Flack and Gouverneur, under whom those plaintiffs claim, and the northern boundary of the grant to Bradford, of the 22d of June, 1848, under whom Nott claims; or whether, notwithstanding those grants, those plaintiffs and others on the north of that line are now entitled to have new grants from the Corporation, by lines extended in the direction of the streets, as laid out upon the commissioner's map, under the Act of 1807, and now actually opened. Such lines would cross Stuyvesant street and Nott's premises diagonally, and the parties thus interested claim the right to go by these lines, not only to Tompkins street, but as much further as the Corporation have established or may establish a new exterior line. Such new grants are claimed by them as a matter of right, and they insist that the grant to Bradford, so far as it interferes with such an extension, is inoperative and void. The plaintiffs' title (in the 2d suit) extends from the middle of 17th to the middle of 19th street only. The other owners, north of Stuyvesant street, claim title to the residue of the cove, as far as 23d street.

If the controversy terminated at Tompkins street, it would, by reason of Thayer and Flagg's withdrawal, cease to be of any very

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great practical importance, as respects Nott's interests, since, up to that line, all that the estate of Griffin—the only other party, except Thayer and Flagg, who, by an extension of their grants in the direction of the streets, would encroach on Nott—could claim, south of Stuyvesant street, would be two small gores; extended, however, beyond that street to Avenue D, the exterior line recently adopted by the Corporation, their claim would embrace all of two blocks, which, with the water front, would be lost to them, and gained by Nott, if Stuyvesant street continued is still to be the dividing line.

The case, therefore, involves not only the question of the propriety of Stuyvesant street as a division line between the two grants up to Tompkins street, but that of its extension as a continuing division beyond that street, in case of new grants.

The consideration of the latter question, however, in the view which I have taken of the case, will become unnecessary.

As between the claimants on both sides of Stuyvesant street and the Corporation, it may be remarked, that both the grants to Bradford on the south side, and to Flack and Gouverneur on the north side of that street, were made to them respectively while they were, in fact, owners of the upland, through title derived from the Stuyvesants; and if the grants were made by proper lines and boundaries, as between all parties who might, at the time they were made, be affected thereby on either side of Stuyvesant street—or, if not made by proper lines and boundaries, still, if such parties or their grantees are concluded by those conveyances, or are estopped by acquiescence or otherwise—there is an end of all controversy in the case, in respect to the rights of the parties, up to the line of Tompkins street.

The grant to Flack and Gouverneur covered the entire portion of the cove between Stuyvesant street and 23d street, Tompkins street and the shore, while that to Bradford extended over all that portion of the cove between Stuyvesant street and 14th street, except that covered by the grant to Nicholas W. Stuyvesant of 1810, the title to which was already in Bradford. The portion of the cove south of 14th street, and between it and 13th street, was owned by Nott, under a distinct grant.

Nott still retains his ownership, but numerous parties have derived title under Flack and Gouverneur, in severalty or in common,

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in sections varying from a block to two blocks in width; and it is a matter of moment to them, to establish some principle by which each may secure to himself as large a share as practicable on the exterior line of the city. This can be done in no way so surely and conveniently as by repudiating the principle upon which the grants were originally made, and claiming the lines of the streets bounding their blocks, extended to the outer line, as the true lines by which the grants should have been and ought still to be made.

Such a rule of division would, in consequence of the direction of the streets, deprive Nott, had Thayer and Flagg remained parties to the controversy, of the larger portion of his lands within the cove, and of his front in Tompkins street; and it was in consequence of an attempt, by Thayer and Flagg, to procure a grant from the Corporation on this principle, overriding the former grant to Bradford, that the first of these actions was commenced by Nott, enjoining the action of the Common Council.

In the first suit, Nott claims that, as having succeeded to the rights of Neziah Bliss, under the deed to him from Nicholas W. Stuyvesant, of the 1st day of September, 1832, by which the upland and the land under water embraced in the grant to Nicholas W. Stuyvesant of 1810, was conveyed, to the extent at least of the 400 feet by the Corporation, and as having also succeeded to Bradford's title, he is entitled, as owner of the adjoining premises, to all the lands under water, and to a grant thereof in front of his premises out to Avenue D, the exterior line adopted by the Corporation in 1850, with Stuyvesant street extended as his northerly boundary; that this street, so extended, is the natural and proper division line between himself and the grantees of Flack and Gouverneur, both in respect to the old grants and any new ones which the Corporation may make; that these grantees and himself stand in the same legal relation to each other, in respect to their rights in the property, in which Peter G. Stuyvesant, under whom they claim, and Nicholas W. Stuyvesant, under whom he claims, stood to each other while they were the owners of the premises; that the Corporation have not and could not, by any subsequent changes of the streets, extend or abridge the rights of either of the parties; that he (Nott) has expended over \$150,000 for the said land, and in filling up and improving the same, in the confidence that he was entitled to all

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the water rights south of Stuyvesant street, continued to the exterior streets, and down as far south as 15th street—and he insists that Flack and Gouverneur received, in their grant from the Corporation, all that they were entitled to as grantees of Peter G. Stuyvesant, and have no title to any grant whatever south of Stuyvesant street.

In the second suit he enlarges his claim, and in his answer insists that Nicholas W. Stuyvesant, under the grant to him of 1810, and by the operation thereof and of the Act of 1826, became seized in fee of the lands between high water-mark and Tompkins street on the east, and between a line commencing on the shore, at the centre of Stuyvesant street, to a point at Tompkins street, several hundred feet north of where the centre line of Stuyvesant street continued strikes Tompkins street as a north-easterly boundary, and a line on the south corresponding therewith and with the southern boundary of said grant; and that thereby, and by the operation of the Acts of 1835 and 1813, (the latter a re-enactment of the Act of 1798,) the said Stuyvesant, his heirs and assigns, became entitled, as new exterior streets should be erected, to fill up the intermediate spaces in front of their premises in Tompkins street, and became the owners of such intermediate spaces.

The plaintiffs in the second suit, and such of the defendants as with them claim under Flack and Gouverneur, insist, on the other hand, that the grant to Bradford was in derogation of their rights as "adjoining owners," that is, as owners of the upland, which they contend is the ownership intended by that expression in the Act of 1807; and they claim that they are entitled to have the lines of their water grants extended over the cove, in the direction and within the limits of the street. By this means, they say, each owner will acquire a fair ratable proportion of front on the extended line, commensurate with the breadth of his line on the shore; and they insist that they are not precluded from such claim, by the fact of Flack and Gouverneur having received a grant bounded on Stuyvesant street.

Flack and Gouverneur received their title from Peter G. Stuyvesant and the Corporation, in trust for an association composed of themselves and others, called "The Stuyvesant Association."

It is unnecessary to trace the mutations of the title down to the

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period of the present actions. For all the purposes of this controversy, the stipulation entered between the parties in the second suit, on the 12th day of February, 1852, is sufficient.

By that, it is agreed that the plaintiffs in the second suit, or some of them, are the owners in fee of the several blocks of land, and land covered with water, lying between the First Avenue and Tompkins street, and between 18th and 19th streets, and also of the several blocks of land, and land covered with water, lying between Avenue A and Tompkins street, and 17th and 18th streets, within the limits of the conveyance by Peter G. Stuyvesant to Flack and Gouverneur, and of the grant to them by the Corporation.

In the first suit there is a stipulation, that the estate of Francis Griffin "is the owner and in the possession of the premises on the East River, between high water line and the eastern exterior street of the city, and extending from 17th street to 19th street;" and a similar stipulation in respect to the other owners, north, up to 23d street. This stipulation contains the reservation, that it is not to be construed as an admission that any of said parties are entitled to any grant south of the centre line of Stuyvesant street.

It will be observed that the grant to Nicholas W. Stuyvesant of 1810, and to Flack and Gouverneur of 1825, were both made before the Act of April the 18th, 1826. This act established Tompkins street "as the permanent exterior street," and provided "that all grants made and to be made by the said Mayor, etc., shall be construed as rightfully made to extend thereto."

I agree with the counsel of the plaintiffs, in the second suit, that, according to the true construction of this act, it simply confirms the validity of grants which had been previously made, in terms, to Tompkins street, and that it does not extend to that street grants which it had not in terms undertaken to convey to that extent.

The act, therefore, ratified the grant to Flack and Gouverneur, as a grant to Tompkins street, while it left unaffected the grant to Nicholas W. Stuyvesant of 1810.

The claim of Nott, therefore, to go to Tompkins street under this latter grant, by virtue of the Act of 1826, is unfounded; and he, consequently—in so far as his right depends on an ownership on Tompkins street, derived from the grant of 1810 and the operation of the Act of 1826—has no right to fill up the space inter-

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mediate Tompkins street and Avenue D, and become the owner thereof under the provisions of the Act of 1813, even if it be conceded that Avenue D is properly established as an exterior line, and that the Act of 1813 is applicable to the case.

The Act of 1826 also authorizing future grants to be made to Tompkins street, that to Bradford, under which Nott claims, was rightfully made thus far.

At the time he received this grant, Bradford was the owner of the land conveyed by the grant of 1810 to Nicholas W. Stuyvesant, which embraced both the tide-way and the 400 feet belonging to the Corporation. The grant was, therefore, properly made to him as "adjacent owner," in either aspect of the meaning of the term.

Whether this grant was properly bounded by Stuyvesant street continued as its northerly boundary, is another question, and yet to be considered.

The owners north of Stuyvesant street are not, unless by acquiescence, concluded by the terms of the grant to Nicholas W. Stuyvesant or Bradford, in respect to the boundary by Stuyvesant street, if, as against the Corporation, they had, or now have, a right to have their grants run south of Stuyvesant street; but if, on the other hand, the Corporation had the absolute right, as is claimed by Nott, to grant in any direction they pleased, to the extent of the 400 feet beyond the tide-way, (which is a question to be considered,) no one can question that Nicholas W. Stuyvesant acquired a perfect title, under his grant, to the whole extent of the land embraced within it as far outwardly from the shore as the 400 feet.

So far as Tompkins street is made the exterior boundary line in the grant to Bradford, it must be considered, under the Act of 1826, as "rightfully made" to that street, but that does not touch the question of the propriety of Stuyvesant street as its northerly boundary.

All the parties claim to go beyond Tompkins street, and to have their grants extended to Avenue D, the present exterior line established by ordinance of the Corporation in 1850, under the Act of May the 11th, 1835.

It is proper to dispose of this question in the first instance.

The Judge, at Special Term, decided that the Corporation have

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no right, under the Act of May the 11th, 1835, to make grants to such exterior line, on the ground, principally, that that act does not, in terms or by implication, convey to the Corporation the fee in the soil under water beyond Tompkins street, nor operate to transfer the title of the State, either to the Corporation or to a grantee under the Corporation.

I coincide substantially in the views expressed by the Judge, at Special Term, on this question, and am clearly of opinion, that no fee is given to the Corporation by implication, as certainly none is given in terms by the Act of 1835, in the lands under the water, outside of, or to the eastward of Tompkins street, and that, consequently, no grant of such lands made, or to be made by the Corporation, conveys or can convey a fee in such lands to the grantee. I am also further of opinion, that the said act cannot be construed to extend by implication the grants already made, bounding on Tompkins street, to such exterior line. Whether the Corporation have or have not the right, under the Act of 1835, to establish an exterior line to the eastward, or outside of Tompkins street; or whether, by establishing a line conditionally within the line of that street, by their resolution of the 8th day of February, 1833, referred to in the opinion of the Judge, at Special Term, they have exhausted their powers under that act, I do not deem it necessary to decide.

I come, then, to the consideration of the main question in the cause, to wit: Whether the grants to Bradford and to Flack and Gouverneur are conclusive, on the parties to this controversy, in respect to the line of Stuyvesant street, as the division line between them, down to Tompkins street, either as the line originally proper and equitable to have been adopted, or as adopted and acquiesced in by the grantees in those grants, or as one which the Corporation had the absolute right, in virtue of their ownership in the tide-way, and 400 feet, to adopt.

It is not disputed, by either party, that the Corporation have an absolute fee in the tide-way; but it is contended by the plaintiffs in the second suit, and such of the defendants as have the same interest with them in the question, that, in respect to the 400 feet, they hold it under the Act of 1807, in trust for the owners of the upland, as the parties intended in that act by "proprietors of the lands adjacent," and can make no grant of such 400 feet in deroga-

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gation of the rights of such owners, even where there has been a grant to a third party of the intermediate tide-way. They claim, that the nature of the ownership of the 400 feet above Corlear's Hook differs from that below that point, in this respect: That, below that point, the Corporation are vested under the Montgomerie Charter with an unqualified fee in the land; whereas, above it, their title, derived under the Act of 1807, is qualified by the proviso in the 15th section of the act in favor of the proprietors of the adjacent lands, that is, according to their construction, of the riparian owners.

On the other hand, Nott claims that the Corporation became absolute owners of the 400 feet, under the Act of 1807, and held it in trust, only, for the owners of the tide-way—that is, of those to whom they had made grants of the tide-way—and that the riparian owners had no rights whatever in the land under water embraced within the 400 feet; but that the Corporation might grant the same to whom and as they pleased, except only, that where a grant had been made of any portion of the tide-way, such grantee became "the proprietor of the lands adjacent," within the meaning of the Act of 1807, and entitled to the pre-emptive right in the land within the 400 feet; and his counsel relies on Furman's case, (5 Sandf. S. C. Rep., 16,) as settling the question, that, as between the Corporation and the riparian owner, the latter had no rights in the space in question.

That case did undoubtedly decide, that, as between the owner of the shore and the Corporation, the former had no title in respect to the tide-way or the 400 feet beyond, but that the Corporation held the fee in absolute enjoyment, and that the provisions of the section of the Act of 1798, which gave to the proprietors of the lands adjoining or opposite to a new exterior street to be constructed, applied only to those who had obtained grants of the whole 400 feet; but that case, it must be observed, respected lands under water below Corlear's Hook, and there is no provision in either charter under which the Corporation acquired title to the tide-way, and the 400 feet beyond on that part of the shore, analogous to the proviso in the Act of 1807, giving to adjoining owners a "pre-emptive right" in grants to be made of the space embraced within the 400 feet.

Apart from that proviso, I admit the rule in Furman's case

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would apply equally above as below Corlear's Hook, but when the Corporation accepted the grant of the 400 feet under the Act of 1807, they accepted it with the condition or proviso in question annexed to it; and if that proviso tended to qualify their absolute ownership of the tide-way in respect to future grants of the 400 feet, they assented to such qualification.

Were it necessary to decide this question in the present case, I should, according to my present convictions, hold to the views entertained by my brother Hoffman at the Special Term, though neither of my brethren at General Term are inclined to agree with me on this point; but the question does not properly arise in the case, nor is it necessary to pass an opinion upon it, since all the three grants—that to Stuyvesant in 1810, and those to Bradford, and Flack and Gouverneur—embraced as well the tide-way as the 400 feet, and were all made at a time when the grantees were in fact the owners of the upland.

The whole question, then, comes to this: By what lines of division or boundary ought the Corporation to have made their grants to Stuyvesant, to Bradford, and to Flack and Gouverneur, respectively? Was it a matter of right with those parties to have their lines run in any particular direction, and to embrace any given quantity of space, or had the Corporation the absolute right to run the lines in any direction, within the cove, which they might see fit to adopt? If the Corporation had not such right, but the grantees were entitled, as matter of right, to have their grants made by lines which, as between all the owners of the shore at the time of the grants, would be equitable and just, then were the lines of division actually adopted, in fact, equitable and just as between those owners; and if not, or if they were equitable and just as between the original grantees, but as between the present parties they are not thus equitable—that is, if the grants were now to be made to the present owners, it would be inequitable and unjust to make them by the same boundaries—may the present parties disturb those grants and claim a new division of water lots on a different principle, or are they concluded by the grants already made and under which they claim?

The argument on behalf of the owners north of the line of Stuyvesant street, and claiming now to go south of it, is, that the grants in question were made at a time when the plan of the city

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had been settled and fixed, under the Act of 1807; that that act manifestly contemplated a general uniform plan of the streets of the city, embracing not only the *terra firma*, or the upland, but the land under the water, to the extent of the 400 feet directed by the act to be conveyed to the Corporation by the Commissioners of the Land Office; and that, to effectuate the intent of the statute, it became necessary for the Corporation, in making its grants, to proceed upon some general uniform plan, by which each riparian owner would get his full, fair proportion, according to such plan, on the exterior street; that, practically, the Corporation have always acted on this principle, having in every instance, with the exception of the three in question, made their grants by the lines of the street; that the only practicable mode of executing the statute, between coterminous owners, is to run parallel lines from the points where the boundary lines of the several properties touch the shore to the exterior line, but not necessarily in the direction in which the lines reach the shore; and that the extent of the grant in breadth should be proportionate to the line of ownership on the shore, in consistency with the general plan, and that this object is best secured by adopting the lines of the streets as those of the boundaries of the grants; and they contend that they are not precluded by the grants already made from claiming a new apportionment among all the present proprietors on that principle.

On the other hand, Nott claims that the present parties on both sides stand on this question in the shoes of Peter G. and Nicholas W. Stuyvesant, and that what would have been just and equitable as between them, is just and equitable as between their grantees; and he claims that the line of Stuyvesant street continued, being a continuation of the division line of the upland, was the true, and natural, and equitable line of division in respect to the land under water at the time those grants were made; not because the dividing line had the same direction on the upland, but because in no other way could each of the brothers have obtained his fair proportion of the cove if the whole of it had been divided between them in their lifetime; and he contends that this is most in accordance with the adjudged cases on this subject.

If the Corporation have an absolute right to convey as they please, both in respect to direction and quantity, there remains, of

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course, no necessity for further discussion, since all parties would be absolutely concluded by the grants already made; but I shall assume, as indeed I have no doubt, that they do not possess such right, but that when grants are to be made, they must be made upon some principle which shall secure to all the shore owners an equitable portion of the exterior line in front.

There is something so extremely plausible, simple and convenient in the rule of division contended for by the owners north of Stuyvesant street, that the judgment is at first strongly impelled to yield its assent; but a glance at the map and a little reflection will show that its practical effect would be substantially to obliterate the cove, and to give to the proprietors north of Stuyvesant street nearly the whole water-front within the cove; and if the streets had inclined a little more to the west, it would effectually deprive the shore owners south of that street of any portion whatever of the exterior line.

It was said, in *O'Donnell v. Kelsey*, (4 Sandf. Rep. 202,) that "the law gives no fixed and certain mode of drawing the boundary line (in case of water grants), but only lays down a general principle which shall govern in such cases, which is, that each riparian proprietor shall receive his ratable share of front on the outer or water line, and that the boundary lines between coterminous proprietors are to be drawn at right angles, or divergent, or convergent to the shore, according to circumstances."

It would be necessary, in order to carry out the views of the owners north of Stuyvesant street, wholly to ignore this equitable and just principle of law, since its effect would be, from the direction in which the streets run, to give to the northern owners within the cove the whole of the water-front, to the exclusion of some, at least, of the owners of the southern portion of the shore. A rule of which this must or might be the practical effect, cannot, we think, be the true one. However the lines of the streets might be the proper boundaries in grants to be made from a straight shore line, it is very evident it can have no application in a cove without working an absolute injustice to some of the shore owners, and this could be justified by necessity alone. Certainly, no necessity of such kind exists in the present case.

Then, how does the case stand upon the question of the propriety of Stuyvesant street as the dividing line at the time of the

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grant of 1810, and upon the rights of the parties under the subsequent grants, and under all the facts of the case.

Petrus Stuyvesant died in 1805, leaving by his will his lands on the cove to his two sons, Peter G. and Nicholas W., divided by Stuyvesant street, which he had opened through his farm, and which reached the shore, and giving to each about an equal portion of the shore line within the cove.

The first water grant within the cove was made to Nicholas W. Stuyvesant, in 1810. It commenced at high water at the south-east corner of Martha and Stuyvesant streets, and thence ran on a parallel with Stuyvesant street, to a point at some distance beyond the 400 feet then owned by the Corporation. In this grant Stuyvesant covenants to build out one-half of Stuyvesant street to the extent of his grant, and also one-half of Nicholas William street, a proposed street adjoining him on the south, also the whole of Martha street, another proposed street, which would form his boundary on the shore line, provided said streets should be recognized and laid out as public streets by the commissioners of streets and roads, which, in fact, was never done. The Corporation reserved the right to run streets through the premises granted, and they give to him the right of wharfage in front of the premises so granted to him. In the same deed he conveys to the Corporation (and the grant to him was on the express condition thereof) a lot of 100 feet by 25 feet at the south-west corner of Stuyvesant street and the river, which was to remain for ever for a public landing for the use of the inhabitants of the city, and also, if the Corporation saw fit, to be used for the purpose of a ferry. The grant contains the proviso, that it was only to pass the right which the Corporation could lawfully claim under their charter and laws, but it certainly did convey to the extent, at least, of the 400 feet, and for a full and adequate consideration, all that the Corporation could lawfully grant, up to the line of Stuyvesant street continued; and that line was evidently adopted as the most natural and proper one, and probably on the supposition that Stuyvesant street was to be extended into the cove, as it ran parallel to Nicholas William, and other streets then contemplated.

The commissioner's map had not at this time been filed.

It cannot be denied that this grant was made to Nicholas W.

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Stuyvesant, while he was owner of the shore; nor can it be denied that the grant is of land under water, in front of his upland.

Was Stuyvesant street continued from the shore an equitable and proper division line, in respect to the land under water, as between him and his brother, Peter G. Stuyvesant, the owner of the shore north of Stuyvesant street, at the time this grant was made?

This is the first question, and I think it may be answered by another. What would have been an equitable line of division between the two brothers, supposing the Corporation, in 1810, had made a grant to them, jointly or in common, of the entire land under water within the cove, to the extent of the 400 feet? A glance at the map will show that the line of Stuyvesant street continued would not only have been the most natural line, but that which would give to each, upon any exterior street which might thereafter be run in the general direction of the main shore, the most equal proportion of front; and that to have made the grants by the lines of the streets, as laid down on the commissioners' map, would have given to Peter G. an almost entire monopoly of the cove, and of the front on the exterior line.

In answer to this, it is said, that as it is manifest that the Legislature, by the Act of 1807, intended a general and uniform plan for the entire city, including lands under water, as well as upland, the rule of apportionment between these brothers in respect to this cove was not that which would have applied had the cove been situated on a country river, or had a separate town been laid out on the Stuyvesant property in that locality; that in reference to this general plan, the cove itself is to be considered as blotted out, and the rights of the owners on the shore, in respect to the direction of their grants, to be controlled by the general plan of the city.

There is, unquestionably, a directness, simplicity and convenience in this view of the subject, as already intimated, which disposes of many of the difficulties which invest it; but, for reasons already suggested, its application would have been inequitable as between the two brothers; and if equity is the basis upon which the water front is to be apportioned among co-terminous shore-owners, then this rule, thus contended for, would have been an unsound one.

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That the apportionment should be made upon the principle of giving to each shore-owner, an equal, ratable proportion of the front or water line as far as practicable, I think, admits of no dispute; nor do I perceive upon what principle a contrary rule can be contended for, nor how it can be claimed with reason, that the Corporation are under an obligation to make grants by the lines of the streets. It can only be by assuming, as the argument does, that the policy of the Act of 1807 requires it. The policy of that statute is no more affected by the nature, extent or quality of the rights of the shore-owners, than it is by the nature of the rights of proprietorship on the *terra firma* itself.

The whole question is one of private right, affecting the owners of the property only. The Act, in giving a pre-emptive right to adjacent owners, neither in terms nor by implication, as I can perceive, undertakes to regulate the manner in which, as between the several owners, that right is to be regulated and made effectual. Its policy was a public one merely, and was fully answered and secured when the general plan itself was adopted by the commissioners. No rule which the Corporation might adopt in making water grants, however inconvenient to the grantees, could in any degree compromise this general plan.

If, then, Stuyvesant street continued would have been a proper boundary, as between the brothers in 1810, had the whole cove then been divided between them, how does the case stand as respects the present parties in interest, who derived title to the upland through the brothers, in respect to their rights under the subsequent water grants?

Peter G. Stuyvesant was, at the time of the grant of 1810, the owner of the whole shore within the cove north of Stuyvesant street, and it is difficult to imagine that he should have been unacquainted with the grant to his brother.

He remained such owner until 1825, fifteen years after the grant to his brother, when he conveyed all his upland to Flack and Gouverneur, bounded southerly "by a piece of ground heretofore called Stuyvesant street," "together with whatever water right the said Peter G. Stuyvesant was entitled to, appertaining to said land."

Within a few months after this conveyance, Flack and Gouverneur applied to and obtained from the Corporation their water

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grant of August the 1st, 1825, bounded "southwardly by the continuation of a line drawn through the middle of Stuyvesant street, and extending to Tompkins street, then the exterior line of the city, established by law." The grantees covenant to make streets through the premises, as laid down on Ewen's map, (and which correspond with the present streets,) including Tompkins street, and are to receive the wharfage from Tompkins street, etc.

If the water right conveyed by the deed of Peter G. Stuyvesant embraced a right to a grant by a line of the streets, such right existed then to as full an extent as it does now, and Flack and Gouverneur knew it. There is no evidence that they then asserted any such right, or made any claim upon the Corporation for a grant upon any such principle. On the contrary, they have no sooner received their deed from Stuyvesant than they apply to and receive from the Corporation a grant, bounded by Stuyvesant street, not only to the extent of the grant of 1810, but to the whole extent of that street as continued to Tompkins street, then the established exterior line of the city; and they covenant, in their grant, to construct the streets which run through the premises as laid down on Ewen's map, (corresponding with the present streets, including Tompkins street,) and are secured by the grant in the receipt of the wharfage on Tompkins street.

The Judge below has not found, nor does the evidence show, what was the condition at this time of the property south of Stuyvesant street, in regard to improvement.

It is contended, however, by the plaintiffs in the second suit, that there is no evidence in the case to show that Peter G. Stuyvesant, or those claiming under him, ever acquiesced in the boundary of the grant of 1810 to Nicholas W. Stuyvesant, or that they ever knew of the existence of such grant; that it is not found, as a fact in the case, that they ever acquiesced in the lines of that grant; and that the acceptance of their own grant by Flack and Gouverneur, with Stuyvesant street as its southerly boundary, is no proof that they intended to acquiesce in that line as the proper southerly boundary of their grant, but that, for aught that appears, they took what was offered to them, or all that they could then get, intending, as their grantees now do, to insist upon a further grant up to the line of 15th street; and that, even if they did know, when they took their grant, of the existence of the grant of 1810, they had a right

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to claim more; and that the acceptance of a grant which did not give them all their rights, could not preclude them from afterwards demanding a further grant, to the whole extent of their legal right.

Unless those plaintiffs have the absolute legal right which they claim, to run their grants by the lines of the streets, as laid down on the commissioner's map, the whole of this argument fails. That they have not such a right has already been asserted, and is, I think, clear.

The line of the streets, as a boundary, is one of equitable property only, and not of right; and if it was equitable and proper in the Corporation to make the grant to Nicholas W. Stuyvesant of 1810, by the lines they did, then Nicholas W. Stuyvesant acquired, as against the shore-owners north of Stuyvesant street, a title, under that grant, which those-owners could not afterwards disturb.

It is true that the Judge has not found, as a fact, that Peter G. Stuyvesant knew of the grant of 1810, or acquiesced in the line of Stuyvesant street as its proper northern boundary; but, apart from the inherent difficulty of supposing him to have continued ignorant of it for 15 years, I do not think the question depends on the doctrine of acquiescence. Such doctrine supposes an erroneous line, and assumes an absolute right, originally, on the part of the acquiescing party, to go by a different line. Such right, as I have repeatedly said, does not exist; and the question, whether the line be or be not erroneous, is the very point in dispute.

The true question is, whether that line was equitable and just, as between the brothers, at the time of the grant of 1810; and whether the same line, continued to Tompkins street, would not have been an equitable and just one, had the whole cove then been divided between them; and whether, by accepting a grant with such line continued as an actual southern boundary, Flack and Gouverneur did not recognize or adopt that line as the true, proper and equitable boundary between them and Nicholas W. Stuyvesant, or those who might claim under him south of that line. The grant to Flack and Gouverneur was made immediately after they acquired title to the shore, by the deed of Peter G. Stuyvesant—they succeeded to, and immediately acted upon, his supposed rights in the land under water within the cove. His

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deed expressly conveyed to them such water rights as appertained to the land conveyed; as they made no delay in applying for a grant, it is not to be supposed that they applied for a less quantity than they supposed themselves entitled to. Undoubtedly, they asked and obtained all they then thought themselves entitled to have, and, as I have shown, all that it would have been reasonable, equitable or proper for Peter G. Stuyvesant to have asked for and obtained, had he never conveyed to Flack and Gouverneur; they evidently considered themselves as standing in his shoes, and entitled only to the extent to which he was entitled.

If they had, at the time they received their grant, any idea of a right to go south of Stuyvesant street, (and they must be held to have known the full extent of their legal rights,) this was, certainly, the time to have asserted it.

I do not say, that, if such a right existed, they were barred by an adverse possession, on the part of Nicholas W. Stuyvesant, of 15 years only; but I do say, that, not asserting such a right, is conclusive evidence that they did not pretend they were entitled to it, and that they must be held to have taken the line of Stuyvesant street as the proper equitable line of division between them and Nicholas W. Stuyvesant, at least to the extent of the grant to the latter, if not all the way to Tompkins street.

That Flack and Gouverneur did not assert a claim to go south of Stuyvesant street, at the time they applied for and received their grant, in 1825, must be assumed as an undisputed fact, there not being a particle of evidence to show it, nor did they assert any such claim, at any time, before the deed of Stuyvesant to Bliss, in 1832; nor did they, in fact, assert a right to such a grant, until the commencement of this action, in 1852—a period of 27 years from the date of their own grant, in 1825.

In the mean time, the parties claiming under Bliss have applied for said grants, in conformity with the line adopted in the deed of Stuyvesant to Bliss, and have expended large sums in the improvement of the property, which it is not to be presumed they would have done, had they known of any such adverse claim as is now set up by the owners, north of Stuyvesant street.

It is, I think, impossible to resist the conclusion, that a line of division, not disputed by Peter G. Stuyvesant for 15 years, nor

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by his grantees for 27 years longer—42 years in all—was considered by those parties as an equitable and proper division between themselves and Nicholas W. Stuyvesant, and those claiming under him, south of Stuyvesant street, and was adopted by them as such equitable division, and that it would now be most inequitable to disturb it.

One other question remains to be disposed of: Dr. Nott claims, that, as an owner fronting on Tompkins street, he is entitled, under the provisions of the Act of 1818, (being a re-enactment of the Act of 1798,) to fill up, and become the owner in fee of the lands under water, in front of his premises, and between Tompkins street and Avenue D, the said line or street adopted by the Corporation in 1850, as the exterior street, in lieu of Tompkins street, under the provisions of the Act of 1835.

If the Act of 1818 applies to this case, it would be necessary, in order to determine this question, to consider whether the Corporation had the right, in establishing an exterior line in lieu of Tompkins street, under the Act of 1835, to go outside of, or to the eastward of that street; but, in my judgment, the Act of 1818 has no application. Its true construction was judicially settled in Furman's case; that provision of the Act, now in question, was intended to obviate a difficulty which this case does not present. The petition of the Common Council, on which the Act was passed, and the preamble of the Act itself, fully show and explain its intent and purpose. In asking for authority from the Legislature to construct exterior streets, on both rivers, of 70 feet in width, at the expense of their grantees of the 400 feet, the Common Council were met with the difficulty, that, by reason of the sinuosities of the shore, some of the grants would not reach to the line of the proposed new street, which was to be on a straight line—the fee of the intermediate space being in the State. The provision in question was inserted in the Act, in order, not only that the Corporation might compel that class of their grantees to aid in the construction of the streets, but that such owners, on complying with the requisitions of the Common Council, might themselves acquire the fee in the land thus owned by the State.

The Act is recited at length in Furman's case. (5 Sandf. S. C. Rep., p. 22, etc.)

Provision is also made in said Act for the lengthening and ex-

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tension of said streets from time to time, and the like provision, as to filling up intermediate spaces, applied also, in cases of such extensions, where the like reason exists; but we think it would be quite too liberal a construction of the Act to hold, that, by the mere fact of the substitution of a new exterior street outside of Tompkins street, if that might lawfully be done, the owners fronting on the latter street acquired thereby, under the Act of 1813, the right to fill the intermediate space, and acquired the title of the State therein. I think the Legislature, in passing the Act in question, contemplated no such case, but that its application should be confined strictly to the cases specified in the preamble of the Act, to wit: those of parties whose grants, "from the curving and irregularities of the shores of the rivers in their original state," though extending to the whole length of the 400 feet, do not reach the line of one of the old exterior streets, about to be lengthened or extended to the line of a new proposed exterior street, if, indeed, the Act applies to the latter case, which may be doubtful. I am, therefore, of opinion that this claim of Dr. Nott cannot be sustained.

As the judgment at Special Term, in some respects, differs from the views herein contained, it must be modified in those particulars, and in others affirmed.

The conclusions, in which the Judges before whom these appeals were argued all concurred, were as follows:—

First.—The line of Stuyvesant street, continued to Tompkins street, would have formed the proper, natural and equitable boundary, as between Nicholas W. and Peter G. Stuyvesant, had the Corporation undertaken to make grants to them of the space within the cove, upon the principle of an equitable division between them in respect to their ownership on the shore, assuming either that, by virtue of such ownership of the upland, they were entitled, under the Act of 1807, to claim and have such grants, or that the Corporation were willing to concede to them such a right, and this, notwithstanding that, according to the plan of the city adopted by the commissioners under that Act, the streets as laid out by them, if continued into the cove, would have followed lines running in a different direction.

And such line of Stuyvesant street formed a proper northerly

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boundary in the grant to Nicholas W. Stuyvesant of 1810, as between him and his brother, at the time the same was made.

Second.—The same line of division was equally equitable and proper as between Flack and Gouverneur, on the one side, and Bradford on the other, as parties succeeding to the title and rights of the Stuyvesants, respectively, at the time those grants were made; and the plaintiff, Nott, as succeeding to Bradford's title, is entitled to claim, as against the parties to the suits who have succeeded to Flack and Gouverneur, that Stuyvesant street, thus continued, and constituting the actual boundary between their respective grants, is the true, proper and equitable line by which those grants, respectively, ought to have been made.

Third.—However true it may be, that the lines or direction of the streets continued may form the most convenient, and, under certain circumstances, a proper basis upon which to make water grants, that, still, this is a matter of mere convenience, and that this alone creates no rule of obligation on the Corporation, nor one that gives to the parties entitled to or claiming grants an absolute right, as against the Corporation, or as against each other, to have them run by such lines. That the question, as between coterminous owners of the shore-line, is always one of equitable apportionment of the space to which the grants are to apply, and that the exact lines of division must necessarily depend upon the relative directions of the shore-line and of the exterior line to which it is intended the grants shall extend.

Fourth.—Without deciding, or intending to express an opinion, whether the Corporation, under the Act of May the 11th, 1835, (providing for the designation, etc., of a permanent exterior line,) may or may not lawfully project or lay out a new exterior line or street to the eastward, or outside of Tompkins street, or whether, if they once have adopted a line within Tompkins street as such new exterior line, they have thereby exhausted all their power under said Act, we are of opinion that no fee is given to the Corporation by implication, as certainly none is given in terms, by the Act of 1835, in the lands under water outside of, or to the eastward of Tompkins street, and that, consequently, no grant of such lands made, or to be made by the Corporation, conveys, or can convey a fee in such lands to the grantee.

We are further of opinion, that the Act cannot be construed to

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extend by implication the grants already made, bounding on Tompkins street, to an exterior line or street outside of Tompkins street.

Fifth.—The parties to the suit, whose grants bound on Tompkins street, have no right, actual or pre-emptive, to grants outside of, or beyond that street; nor have they any right or title, derived from the Act of 1835, in the land under water between that street and Avenue D, the exterior line recently adopted; nor have they, as adjacent owners, a right to fill in such intermediate space, and become the proprietors thereof, under the provisions of the Act of 1813.

Sixth.—The parties are concluded by the grants already made as to Stuyvesant street, as the dividing line between the parties claiming adversely to each other in these actions, such line being also an equitable and proper one; and the claim of the plaintiffs in the second suit, and the other owners to the north of that street, cannot be sustained.

Seventh.—The judgment at Special Term must be modified in the particulars in which it does not conform to the principles of this decision.

No costs of appeal to either party.

Judgment accordingly.

THE UNITED STATES TRUST CO. OF N. Y., RECEIVER OF THE EMPIRE CITY BANK, v. DENNIS HARRIS.

When the jury, in an action for the recovery of money, in addition to answering special questions submitted to them by the Court, find a general verdict for the defendant, and the Court at the trial directs the questions of law arising on the trial to be first heard at the General Term, and judgment to be there applied for in the first instance, the plaintiff cannot have a judgment, unless the facts specially found are inconsistent with the general verdict, and entitle him to such judgment.

And though the Court, in charging the jury, instructs them, in addition to answering the special questions, to find a general verdict for the *plaintiff*, yet, if they find a general verdict for the *defendant*, and the Court thereupon, against the objection and exception of the defendant, directs such general verdict for the defendant to be changed to a general verdict for the plaintiff, subject to the

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opinion of the Court at General Term, on the idea or assumption that the general verdict, as the jury gave it, is inconsistent with the finding, upon the questions submitted, the Court at General Term must give such judgment as ought to have been given, if the general verdict, actually rendered, had not been changed by the order of the Court. The Court, at the trial, has no power to order a verdict for one party to be changed to a verdict in favor of the other party, on any such ground.

When personal property is purchased, upon a misrepresentation of its value, but such representation is made in good faith, and in an honest belief of its truth, the purchaser must pay a note given by him for its price, he having retained the property bought, although it may have been worthless at the time of the purchase. To constitute a defence to an action to recover the contract price of property sold, it is necessary to prove more than that the vendor expressed an erroneous opinion of its value, in which the purchaser chose to confide, instead of exercising his own judgment, exclusively, or consulting others more competent to judge than himself, when the opinion was honestly expressed, and no deceit was practised to put him off his guard.

A note given to a bank by a purchaser of its stock, which the bank owns, is not made illegal and void, by Sub. 3 of § 1 of 1 R. S., part I, title 2, ch. 18, art. 1. That section applies to an original subscriber for stock, and to the payment of the sum so subscribed.

The portion of the capital stock of a bank, which the bank owns by virtue of a purchase of it, it may sell on credit, and a note is not void merely because it was given to the bank, on such purchase, for the contract price of the stock, nor because it was discounted by the bank, to enable such purchaser to pay for the stock so bought.

The maker of a note given to a bank, when sued by a receiver of its property and effects, cannot enforce, as a counter-claim against the note, a demand against the bank not due, either when the note matured, or the receiver was appointed.

(Before Bosworth and Woodruff, J. J.)

Argued, June 8th, and decided, October 17th, 1857.

THIS action was tried in October, 1856, before Mr. Justice Duer and a jury.

It was commenced by the United States Trust Company of New York, as Receiver of the Empire City Bank, against Dennis Harris, as maker of a note for \$10,122.50, dated October 31, 1854, payable 60 days after its date, to the defendant's order, and by him indorsed.

The complaint alleged the making, indorsement and delivery of the note, by the defendant, to the Empire City Bank, a banking association under the Act of the 18th of April, 1838, and the Acts amending the same; the non-payment of the note at maturity; that the said bank had been declared insolvent by the Supreme Court,

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and that the plaintiff had been appointed receiver of its property, and owns said note; and prayed judgment for the amount of the note, with interest from its maturity. The complaint was verified on the 16th of May, 1858.

The defendant answers:—

I. That no "good, valuable or lawful consideration" was ever given, or paid, for the note, by the bank; but it was obtained by the bank from the defendant "fraudulently," "without paying any consideration therefor."

II. That "the officers of the bank solicited the defendant to become a stockholder therein, and made false representations as to the value of the stock; and, relying upon it, the defendant bought 400 shares of the stock, and gave the note therefor; that the officers knew, and the fact was, that the stock was worthless."

III. That "the Empire City Bank, at the time of its receiving the said note, was a moneyed corporation, carrying on its business in the City of New York, under and by virtue of an Act, entitled "An Act to authorize the business of banking," passed April 18th, 1838, and the several Acts amending and in addition to the same; and that the said note was taken and received by the said bank, for the amount of the stock of the said bank issued to the said defendant, and was discounted, by the said bank, contrary to the provisions of the first section of the first article of the second title of the 8th chapter of the first part of the Revised Statutes of the State of New York, entitled "Regulations to prevent the insolvency of moneyed corporations, and to secure the rights of their creditors and stockholders;" and that "the receiving of the said promissory note in manner aforesaid is thereby prohibited, and was unlawful and void, and the said note was also void."

IV. That, "on his consenting to take or purchase" \$10,000 "of the stock of the said Empire City Bank, on the representations of its officers that it was worth over par, the defendant," "to secure the payment" of said \$10,000, assigned to Isaac O. Barker, a director of the bank and chairman of its finance committee, a bond and mortgage for \$12,938, made by one George Birkbeck, and, "for the accommodation and at the request of the said bank, he also made and gave to the bank the note" sued on, "for the amount of said stock," and said bond, and mortgage, and note were transferred to the plaintiff at the same time, and are now in its possession,

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as receiver; that such assignment of the bond and mortgage was unlawful and void, and the note is also void. He denies that the plaintiff is the lawful owner of said note.

V. The answer alleges, by way of counter-claim, that, on the 13th of November, 1854, at the request of, and to accommodate said bank, he made and delivered to it his seven promissory notes, amounting to \$20,000; that, in an action pending in this Court, (when this suit was commenced,) between the plaintiff and this defendant and others, this Court decided, in August, 1855, that the plaintiff should surrender to the defendant so many of such notes as had come to the hands of the plaintiff; that three of said notes had been negotiated by the bank before the plaintiff was appointed receiver—one for \$2024.80, being held by the Bull's Head Bank, and one for \$5062.01, being held by Beebe & Co.—and that they are still outstanding against the defendant. In November, 1854, after the defendant was a director, at the request of the bank, he lent it his note, at 30 days, for \$2000, which is past due, unpaid and outstanding.

"And the said defendant further states, that, on or about the first day of November, 1854, the said Empire City Bank hired a banking house of the said defendant for the period of two years, at the rate of \$2,000 per annum, and on the first day of May, 1855, the sum of \$1,000 for such rent was in arrear and unpaid by the said Empire City Bank, and the same still remains due and unpaid to the said defendant; which said several items the defendant will insist upon and give in evidence at the trial of this cause, by way of set-off or counter-claim to the demand of the said plaintiffs in this action.

"Wherefore, the defendant demands judgment, that the said complaint be dismissed, with costs."

The answer was verified on the 2d of January, 1856.

The plaintiff served a reply, putting at issue the material allegations of the counter-claim.

On the trial of the issues, the plaintiff read the note described in the complaint in evidence, and produced an exemplified order of the Supreme Court, dated January 29, 1855, declaring the Empire City Bank insolvent, and appointing the plaintiff receiver of its property and effects, and rested.

The defendant gave testimony, tending to show that, in

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October, 1854, there was an interview or negotiation between Abraham M. Bininger and the defendant and others, of the one part, who were arranging, as associates, to organize a bank, to be called the *National Exchange Bank*; and William Adams, Jonathan Purdy and Leonard H. Church, on behalf of the Empire City Bank, of the other part, in relation to the defendant and his associates becoming stockholders and officers in the Empire City Bank; that the inquiry was made, whether this bank was solvent. One witness, Mr. A. M. Bininger, said that "Creamer represented to us (viz., the defendant and his associates) that the stock was worth 114 on the books, and that it was worth cash 104, and we told them, (viz., Adams, Purdy and Church,) if what Mr. Creamer had represented was true, we were willing to come in, and the committee, as I understood it, assented to it."

Defendant and his associates then agreed to take \$75,000 of the stock of the Empire City Bank; and the bank was to be removed to the corner of Greenwich and Duane streets, to a banking house owned by the defendant. Bininger was to be president, Creamer cashier, Church, who was then cashier, was to be vice-president, and Harris, Mabee and Dorr, to be directors.

Mabee & Dorr paid cash for their stock. Harris, the defendant, took stock to the amount of \$10,000. Bininger was elected director and president on the 23d of October, 1854. The bank suspended payment on the 9th of December, 1854.

Evidence was given, by both parties, as to what was said at the interview before referred to, and as to the actual value of the stock at that time. Bininger, on his cross-examination, among other things, said, as follows:—

"We had no proposition from the Empire City Bank when we met their committee, unless the proposition of Creamer was made by their authority; the committee were, Mr. Adams, Mr. J. Purdy and Mr. Church; I do not know that any representations were made by the committee, except that myself and Mr. Harris stated that Creamer had made representations that the stock was worth 114 on the books, and 104 cash, and they assented to the statement; Mr. Adams stated to us that the proper mode was for us to make an examination of the books ourselves; he thought it was hurrying up the matters too much; I think Mr. Harris

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stated the price was 98 in the market" . . . "I was a witness upon the proceeding before Judge Roosevelt, in relation to the insolvency of the bank, in January, 1855; that proceeding resulted in declaring the bank insolvent; I made an estimate of the value of the stock, and stated on oath before Judge Roosevelt, that I thought the stock was worth 70 per cent." . . . "Harris's note was taken after I became president; the note was presented for discount; I do not know that it was discounted by the board, but think it was referred to the finance committee, consisting of the defendant and Isaac O. Barker; the \$75,000 of stock was not taken; including Harris's stock there was about \$12,000 only taken."

Isaac O. Barker, "sworn and examined on the part of the plaintiff, said:—I was one of the directors of the Empire City Bank, and for a short time vice-president; Harris requested us to discount his note for the stock he was to take; we refused, and he then offered the note in this action, and a bond and mortgage of Birkbeck, as collateral security; we took it and discounted the note; the bond, mortgage, and assignments, now produced, are the papers referred to."

"It was proved that two of the notes of Dennis Harris, mentioned in the answer, and on which a counter-claim was made—one amounting to \$5062.01, and the other for \$2,000—held by Beebee & Co., had been paid out of the proceeds of a mortgage foreclosed in this Court under a decree of this Court, but that the costs of Beebe & Co. in suits brought on the notes had not been paid; and Goodman, the attorney of Messrs. Beebee & Co., testified that the suits on those notes were still pending, and that he intended to prosecute the same for the recovery of his costs thereon, if he could."

Some other items of the evidence are stated in the opinion of the Court.

The case on which the cause was heard at the General Term, concludes thus, *viz.* :—

"When the testimony was closed, the cause was summed up by the counsel for the respective parties, and the counsel for the defendant requested the Judge to charge:—

I. That the note on which the suit was brought, was without consideration and void.

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II. That the defendant gave the note, under false representations, of the officers or directors of the bank, as to the value of the stock.

III. That the note was received and discounted, in violation of the statute; that the issuing of the stock, which was issued and transferred to the defendant for the note, was illegal, and the note was void.

IV. That there was nothing due from the defendant to the plaintiff, even if the note had been valid; and that the defendant had a just counter-claim, or set-off, equal to the whole amount of the note; which said several points, the Judge stated he should refuse to charge, and should overrule for the purposes of this trial, and should reserve all questions of law for the General Term; to which ruling of the Judge, the counsel for the defendant then and there excepted; and then the Judge charged the jury, and stated to the jury that there were certain questions of fact, which it was proper for them to decide, and to find specially, and he thereupon submitted to them the following questions, viz.:—

I. Were the shares of the capital stock of the Empire City Bank entirely worthless on the 23d day of October, 1854?

II. Did any of the officers of the bank, on or before that day, represent to the defendant that the said shares were worth par or more than par?

III. If you answer yes, to the last question, did the defendant, upon the faith of such representation, agree to purchase the shares of the stock which, soon thereafter, were transferred to him?

IV. If such representations were made, were they made in good faith—that is, in the honest belief of their truth?

On the first question, the Court charged, among other things, that, as all the assets of the bank had passed into the hands of the receiver, the best evidence of their value that had been given, was that of the secretary of the receiver, from which it appeared that, at present, the stock was worthless. The burden of proof was, therefore, upon the plaintiffs, to show that, on the 23d of October, the time of the union of the two banks, the stock was worth more than it is at present, and that it had depreciated since that time; and, if the jury did not consider that the plaintiffs had shown such depreciation since that time, they should answer the first question

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in the affirmative. To which charge of the Judge, the counsel for the plaintiffs then and there excepted.

The Court directed the jury to answer the said questions specifically, and to find a verdict for the *plaintiffs* for the full amount claimed, subject to the opinion of the Court at General Term, on a case to be made, and subject to adjustment."

The jury brought in a sealed verdict, and answered the questions submitted to them, as follows:—

I. "Were the shares of the capital stock of the Empire City Bank entirely worthless on the 23d day of October, 1854?

A. Yes.

II. Did any of the officers of the bank, on or before that day, represent to the defendant that the said shares were worth par or more than par?

A. Yes.

III. If you answer yes, to the last question, did the defendant, upon the faith of such representations, agree to purchase the shares of the stock which, soon thereafter, were transferred to him?

A. Yes.

IV. If such representations were made, were they made in good faith—that is, in the honest belief of their truth?

A. Yes.

And the jury also find a verdict for *defendant*; but the Court, deeming the verdict to be inconsistent with the special finding of the jury upon the questions submitted to them, set aside the same, and ordered a verdict for plaintiffs for \$11,397.91, subject to the opinion of the Court at General Term, upon exceptions taken upon the trial, and also upon the case to be made, and also subject to adjustment as to the amount.

To which action of the Judge, in directing the verdict to be changed as aforesaid, the counsel for the defendant then and there excepted."

John M. Mason, for plaintiff.

Gerardus Clark, for defendant.

I. The note in question was given without any good or val-

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able consideration, and is therefore void. The ostensible consideration was a certain amount of the capital stock of the said bank, which the jury have found was entirely worthless when the bargain was made. The capital of the bank was entirely gone. And where the article sold turns out to be of no value, it is not necessary to show it was returned.

II. The defendant entered into the contract, and gave the note, under a misrepresentation of the officers of the bank as to the value of the stock; and the jury have found that fact, and that the defendant was induced thereby to enter into the contract. This rendered the contract fraudulent and void. And where the representations are false, and the defendant is injured thereby, the sale will be voidable, although the vendor did not know whether they were true or not. And if there be misrepresentation, without any fraudulent intent, it is still a fraud in law, and will vitiate the contract. And even if the officers of the bank believed in the truth of their representations, it will not exonerate the bank; if such representations were false, it will still be a fraud in law. If the ignorance of the officers, who made the representations as to the condition of the bank, arose from the unquestionable negligence of such officers, it is as fatal as if the falsehood was intentional.

III. The alleged consideration was illegal, and therefore void. It appeared that the stock transferred to the defendant for the note was (wholly, or in part) stock which the bank had caused to be purchased at auction, and stood in the name of Elijah F. Purdy, one of the directors, in trust for the bank, in violation of the statute. (1 R. S., 589, 3, 1; 3 Coms. 479, 485, 486, *Gillet v. Moody*; 5 Barb. R. 12, *Leavitt v. Blatchford*.)

1. The condition of the bank was such as to preclude the idea that such stock was purchased with surplus profits: it was purchased in order to prevent the stock being depressed below a certain figure. 2. And it was illegal to have such stock purchased, or held, in the name of any person in trust for the bank. 3. And if any part of the stock transferred to the defendant, under the contract, was stock thus purchased and held in trust for the bank, (and therefore an illegal consideration,) it rendered the whole contract void; it being an entire contract, if any portion of the consideration was illegal, the whole contract was void. A

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contract is entire, whenever the consideration agreed upon is single and entire.

IV. If the contract or act of the bank, in buying in their own stock and selling it again, was illegal, then the securities taken for it are void. And the bank's buying the stock in the name of Purdy cannot legalize the transaction. When a statute prohibits an act, on the part of a corporation, that act cannot be legalized by being done indirectly. (9 Cowen, 463, *McCarthy v. Orphan Asylum*; 3 Coms. 487, *Gillett v. Moody*.)

V. The bank practised a deceit upon the defendant, as to the kind of stock they transferred to him, which rendered the contract void. The defendant contracted with the bank to take \$10,000 of their original stock, the object evidently being to increase the capital of the bank, and not to afford individual directors an opportunity to sell portions of their stock at par, when it was selling at auction at a greatly reduced price, even if it could be sold at all. But the bank did not transfer to the defendant any original stock, but, partly, stock which they had illegally purchased at auction much under par, and, partly, stock claimed to be owned by one of the directors. 1. If such stock was held in trust for the bank, the trust was illegal and void, as already shown. (1 R. S. Part 1, Tit. 2, Ch. 18, Art. 1, § 7.) 2. If it was the property of such director, then the bank had no title nor right to sell it, and the sale was void. (1 R. S., 3d ed., in respect to sale of stock not owned by the seller. See also 2 Kent's C. 803, last ed., note b.)

VI. The note is void, by reason of its having been received and discounted in violation of the statute. (1 R. S. 589, Part 1, Tit. 2, Ch. 18, Art. 1, § 1.) In this case, the evidence is, that the note was received by the bank in payment for stock which the defendant agreed to subscribe for, or take, and that it was discounted. There was, therefore, an entire violation of the provisions of the statute in this respect; and any securities taken contrary to the positive provisions of a statute are void. (2 Kent's C. 597, 598, 599, last ed.; Chitty on Con. 570.) And a party to such contract may take advantage of such illegality. (Chitty on Con. 570, 571, note; Id. 576, last ed.)

VII. There was error in the Judge's directing the general verdict, found by the jury in favor of the defendant, to be changed into a verdict for the plaintiff. It being an action for the recovery

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of money only, the jury had a right to find a general verdict (Code, § 261, (216,) p. 274, last ed.) And, as the special finding of facts was not inconsistent with the general verdict, the Judge had no authority to change it under § 262 of the Code.

VIII. It was part of the arrangement, between the bank and the defendant, that the former should hire the banking house of the defendant, at the corner of Greenwich and Duane streets, for two years, from the 1st of November, 1854, at the rent of \$2000 per annum, as will appear by the minutes of the board of directors. The bank took possession of the banking house, under the agreement, and transacted their business there, but failed in about thirty days thereafter. The building was not otherwise rented or occupied during the two years, and the bank is indebted to the defendant for the two years' rent, amounting to \$4000.

IX. Upon the whole case, the defendant is entitled to judgment.

BY THE COURT. BOSWORTH, J.—The cause of action, stated in the complaint, is a promissory note for \$10,000, made by the defendant, dated the 31st of October, 1854, payable 60 days after its date, and alleged to have been made and delivered by the defendant to the bank.

The answer sets up four defences:—

1. It alleges, generally, that the bank paid no value for the note, and obtained it fraudulently from the defendant.
2. That the note was given to the bank for shares of its stock, amounting to \$10,000, which stock the defendant bought of the bank, by reason of false and fraudulent representations of its officers, that the stock was worth above par, when, in truth, it was worthless and of no value.
3. That the note was received by the bank, "for the amount of the stock of the said bank issued to the said defendant, and was discounted by said bank, contrary to the provisions of the first section" of the article of the Revised Statutes of New York, entitled, "Regulations to prevent the Insolvency of Moneyed Corporations, and to secure the Rights of their Creditors and Stockholders," whereby, it is insisted, that such reception of the note was unlawful, and that the note is void.
4. That on defendant's consenting to purchase \$10,000 of the stock of the bank, at the request of its officers, and on certain rep-

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resentations made by them as to its value, he, at the request of the bank, to secure the payment of said \$10,000, assigned to one of its directors a bond and mortgage, made by one Birkbeck, for \$12,933, and at the request, and for the accommodation of the bank, he made the note in question for the amount of the stock, and gave it to the bank, and that the note and bond and mortgage were transferred to the plaintiff at the same time, and are in its possession, as receiver.

It insists that this assignment of the bond and mortgage, and also the note, are void.

The answer then sets up a counter-claim, the particulars of which need not be stated.

When the evidence was closed, the defendant requested the Court to charge several propositions, which "the Judge stated he should refuse to charge, and should overrule for the purposes of this trial, and should reserve all questions of law for the General Term." To which ruling of the Judge, the defendant's counsel then excepted.

The Judge then submitted four questions of fact specially to the jury, and directed "the jury to answer the said questions specifically, and to find a verdict for the *plaintiff* for the full amount claimed, subject to the opinion of the Court, on a case to be made, and subject to adjustment." No exception was taken to this form of submitting the cause to the jury, or to the instruction to find a verdict for the plaintiff, except such as may be involved in the previous exception to the refusal of the Court to give the instructions requested.

The jury answered each of the four questions. The case further states, "that the jury also found a verdict for the *defendant*; but the Court, deeming the verdict to be inconsistent with the special finding of the jury, upon the questions submitted to them, set aside the same, and ordered a verdict for plaintiff for \$11,397.91, subject to the opinion of the Court at General Term, upon exceptions taken upon the trial, and also upon a case to be made, and also subject to adjustment as to the amount."

"To which action of the Judge, in directing the verdict to be changed as aforesaid, the counsel for the defendant then and there excepted."

In our view of this case, in the form in which it is presented,

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it becomes necessary to determine whether the Court at General Term must treat it as one in which a general verdict has been rendered for the defendant, whereby all controverted facts have been determined in his favor, except those found in answer to the questions specially submitted.

If that view of the case should be taken, the plaintiff cannot have judgment in its favor, unless entitled to it upon the facts found in answer to the four questions, although all the other material facts in issue should be found in favor of the defendant.

In such a view of the case, it would be improper for the Court to look into the evidence, to be influenced by its own conclusions of fact, as it would form them upon the evidence. It can only look at the facts established by the general verdict, and those found in answer to the four questions submitted.

If the latter are consistent with the former, a general verdict for the defendant would entitle him to a judgment. If inconsistent with the general verdict, the special findings must control it, and such a judgment be given as they require.

The Court, at the trial, could not have ordered a general verdict for the plaintiffs, unless of the opinion that, upon the evidence, all the controverted facts, except those embraced in the questions submitted, were clearly with the plaintiff.

It is the province of a jury, in every action for the recovery of money which may be submitted to them, to find either a general or special verdict. (Code, 261.)

The jury were instructed to find a general verdict for the plaintiff, but they disregarded the instruction and found one in favor of the defendant.

According to the case, we are not at liberty to conclude, that on rendering their verdict, the jury were reminded that they had probably forgotten the direction to find a verdict for the plaintiff for the amount of its claim, and that thereupon the jury corrected an unintentional error, and gave a general verdict for the plaintiff.

The case states that the Court set aside the verdict, and ordered one in favor of the plaintiff, because the general verdict was deemed to be *inconsistent* with the special finding upon the questions submitted.

It could not be set aside for any such reason, even if the fact

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was as the case states it was assumed to be. Judgment might be given for the plaintiff, notwithstanding, if the facts specially found warranted it, but the general verdict would remain on the record in the form it was rendered.

Although the general verdict was vacated at the trial, we do not feel at liberty, in disposing of the motion before us, to decide the case otherwise than as we should deem it our duty to do, if the verdict had been left as the jury rendered it.

In this view, the defendant has recovered a general verdict in his favor, and certain facts have been specially found.

Do the facts, thus specially found, entitle the plaintiff to a judgment, although all the other material facts, put at issue by the pleadings, are to be deemed to have been found for the defendant?

As to the first and second defences, it is enough to say, that the jury have found that the defendant purchased \$10,000 of the capital stock of the bank; that, although its value was misrepresented, the representations made were merely expressions of an erroneous but honest opinion. Its value was a matter of estimate and opinion, and there can be no pretence that any thing was done to mislead the defendant. He was invited to examine the condition and assets of the bank, and had an opportunity to do so.

The special finding negatives the defence of fraud, and the stock, although found to be worthless, had enough of value to uphold a promise to pay the stipulated price. To constitute a defence to an action to recover the contract price for property sold, it is necessary to prove more than that the vendor entertained and expressed an erroneous opinion as to its value, in which the purchaser chose to confide, instead of exercising his own judgment exclusively, or consulting the opinions of others more competent to judge of it than himself. He must show that some deceit was practised, to put him off his guard.* (*McCracken v. Cholwell*, 4 Seld. 133; *Johnson v. Titus, et al.*, 2 Hill, 606; *Fay's Adm. v. Richards*, 21 Wend. 626; *Van Epps v. Harrison*, 5 Hill, 63-69.)

Although the jury have found the stock to have been worthless at the time of the defendant's purchase of it, the evidence is

* *The City Bank of Columbus v. Bruce & Fox*, (17 N. Y. R. 507.)

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clear that it was sold at auction in the following November, at \$2 and 82 $\frac{1}{2}$ per cent.; and that the defendant, in fact, actually sold \$2000 of it, in amount, and transferred the other \$8000, as security for a loan. It had enough of value, in the absence of all fraud or deceit in the sale, to make the purchaser of it liable to pay the contract price.

With reference to the fourth defence, it is obvious, inasmuch as *that* asserts that the defendant *purchased* the stocks, and as the jury have found that it was, in fact, *purchased*, and without any fraud practised by the bank or its officers, that the defendant should pay the note, as he gave it to the bank for the amount of the stock, although the bank requested, as an accommodation to itself, that this evidence of liability for the purchase should be given. On the theory of the fourth defence, the stock was the consideration for the note, and the note was given for the stock, and this particular obligation was given to accommodate the bank—the accommodation consisting in its having the defendant's note, which it might possibly use, while the credit was running, instead of the transaction being left to result in a mere claim for stock sold and delivered.

The third defence is the one of most difficulty. That asserts, that the note in question "was *taken* and *received* by the said Empire City Bank, for the amount of the stock of the said bank issued to the said defendant, and was discounted by the said bank, contrary to the provisions of the *first section*" of the article of the statute referred to.

We think it just to hold, that the defendant meant to be understood as alleging that this note was given and received for the stock so issued, or was discounted to furnish the defendant the means to pay for the stock.

We therefore assume, as the most favorable view for the defendant of which the terms of this part of the answer admit, that the note was delivered and received in payment for the stock, or that the note was made and discounted to furnish means to the defendant with which to pay for the stock.

These were the facts which the defendant attempted to establish at the trial; and, on the argument before us, it was contended by the defendant that such facts were sufficiently proved.

Sub. 3 of the 1st section of the article of the Revised Statutes, which is alleged to have been violated, declares it not to be lawful

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for the directors of any moneyed corporation to discount or receive any note "in payment of any instalment actually called in and required to be paid, or with the intent of providing the means of making such payment."

This language clearly refers to an original subscriber for stock, and to the payment of the sum so subscribed. The object of this statute is, to require an actual cash payment of the whole subscription; and sub. 4 is designed to prevent the withdrawal of any part of it, by discounting any note of such stockholder, with intent to enable him to withdraw it.

It becomes material, therefore, to ascertain in what sense the word "*issued*" is used in setting up this defence.

The second and fourth defences describe the transaction as a *purchase* by the defendant of the *capital stock* of the bank.

The third, fourth and fifth of the defendant's printed points, presented on the argument of the present motion, assert, that the stock which the defendant purchased, and for which the note in suit was given, was stock which the bank had previously bought at auction, for its own benefit, which purchase is alleged to be illegal, because, as it is insisted, the bank could have had no surplus profits with which it could purchase or pay for it.

The jury have found, in answer to the third question submitted, the fact of an actual purchase of the stock, and of the transfer of it to the defendant.

We think it just to conclude, that the word "*issued*," as employed in stating the third defence, was employed as synonymous with transferred or assigned; and that no more was meant to be affirmed, than that the bank had sold and transferred \$10,000 of its capital stock, and taken this note in payment, or had discounted the note to furnish means to the defendant to make such payment.

We have not been referred to any statute declaring it to be unlawful for a bank to sell, on credit, shares of its stock which it may have previously purchased, or to take a note for the amount, payable at the expiration of the stipulated credit. Unless such a statute exists, the fact of such a sale, on credit, and receiving the purchaser's note for it, would not render the note void.*

The fact that the bank had previously purchased this stock at

* *The City Bank of Columbus v. Bruce & Fox* (17 N. Y. R. 507).

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auction, and paid for it out of its capital, instead of its surplus profits, is not alleged in the answer; and that fact, if it were so, would not prevent its acquiring title to the stock so purchased, as between itself and its vendor. To what consequences or penalties the directors, consenting to such a transaction, might be subjected, is a question which does not now arise.

The bank having become owner of the stock, and having sold and transferred it to the defendant, he is liable to pay for it the price at which he bought it.

We conclude, therefore, that there is nothing stated in the third defence, after conceding the fact to be, as the jury have found, that the stock alleged to have been "issued" was stock "transferred" to the defendant, on a purchase of it by him from the bank, which can exempt the defendant from liability to pay the note which he gave for it.

If we look into the evidence, with a view to ascertain whether the trial proceeded on the theory of the third defence being such as we have construed it to be, we shall find that it is free from doubt, that the defendant purchased this amount of stock from the bank, after it had been organized and was in full operation.

It was not attempted to be proved that the defendant was an original subscriber. It also appears that the stock was paid for in money. The note was, in fact, discounted; but the evidence is entirely satisfactory, that the bank refused to discount it, to furnish the defendant means with which to pay for the stock, and that after such refusal, it was discounted, upon the collateral security of a bond and mortgage for its payment at maturity; and the evidence is quite strong, that the stock was paid for, by a check drawn on another bank.

As to the supposed counter-claim, we think that none is stated.

It consists of a claim for rent of a building, hired of the defendant for two years from the first of November, 1854, at a rent of \$2,000 per annum.

The receiver was appointed the 29th of January, 1855, the note in suit fell due on the 2d of that month, and no rent would be due until November, 1855. Such rent could not be set off in this action.

We think there is nothing in any of the defences alleged, as

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suming so much of them to be true as stated, as is not negatived by the facts specially found, which can impair the legal effect of the facts established; viz., that the defendant purchased stock of this bank to the amount of \$10,000, and agreed to pay that price for it, and that he was not induced by fraud to make the purchase; and, having taken a transfer of the stock on such a purchase, he is liable to pay the contract price. And, if we must assume that the note was given for the stock, we think it is valid, and that judgment should be entered for the plaintiff on the verdict.

Judgment was entered accordingly.

BARBARA BURGER, by her next friend, plaintiff and respondent,
v. Thomas White, et al., defendants and appellants.

It is within the discretion of the Court, after the evidence is stated to be closed, to open the case, and permit further evidence to be given.

When a party, moving for a new trial, is not entitled to it, as a matter of right, he can not, on an appeal by him from an order granting it on terms, procure its reversal by reason of such terms. They are matters resting purely in discretion, and are not reviewable on appeal.

Where a husband does nothing for the support of his wife, and she, having a separate property, employs herself in trading therewith, with his knowledge and assent, he neither assisting nor interfering therewith, such property does not become, in equity, liable for his debts. It remains, with its proceeds and profits, her sole and separate property. *Freeman v. Orser*, (5 Duer, 476,) commented on, and distinguished from this case.

(Before Bosworth and Woodruff, J. J.)

Heard, June 17th; decided, November 7th, 1857.

THIS action comes before the Court, at General Term, on an appeal by the defendants from an order granting a new trial, in respect to the question of damages, on terms, and also from the judgment entered on a verdict in favor of the plaintiff.

It was tried in June, 1855, before Mr. Justice Bosworth and a jury. The plaintiff is a married woman.

The action was brought by her, January 3d, 1855, against the defendants, for taking and carrying away, on the 30th of December,

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1854, and converting to their own use certain meats and other provisions, being the stock in trade of a butcher's stall, which she claims as her separate property.

The defendants justify the taking, under an execution against Michael Burger, (husband of the plaintiff,) and deny that the goods, etc., taken, were in the possession of the plaintiff, or were her property.

The evidence given on the part of the plaintiff, on the trial, tended to show, that in 1850 or in 1851, or in both years, the plaintiff, by inheritance, and as next of kin, became entitled to a share in the estate of her father, and that, about that time, it was collected by her brother-in-law, Charles Burger, under a power of attorney, and brought to this country, to the amount of several thousand dollars.

That, for several years past, her husband has passed his time about porter-houses, leading an idle life—doing nothing for the support of his wife.

That in October, 1854, prior to the taking complained of, the plaintiff purchased, with a portion of the money received from the estate of her father, a butcher's shop in the First Avenue, in this city, and stocked it with meats, employing her brother-in-law, Charles Burger, to make the purchases, kill the cattle and collect bills.

That she devoted her own time and labor, daily, to the business, superintending the shop, etc., employed another assistant and paid him, and carried on a "large business." There was evidence that her husband knew of this, and he was sufficiently shown to have assented to it.

The goods taken were the meats, etc., in the shop so occupied by her. Whether the business was profitable or not does not distinctly appear, and it is impossible, from the evidence, to say whether any portion of the property taken was obtained by investing profits previously accrued. Some of the evidence would indicate, that the principal moneys invested were greater in amount than the value of the property found as damages by the jury.

On the other hand, there was evidence tending to impair the credibility of Charles Burger, the plaintiff's principal witness, and some evidence that the plaintiff's husband sometimes assisted his wife in the shop.

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The defendants' counsel requested the Judge to charge the jury, that, in case either Jacob Burger (the husband) or the plaintiff bestowed their daily labor in and upon the business carried on, and "such labor was a part of the avails with which the property in dispute was purchased, then, in that case, the plaintiff could not recover."

The Judge charged, among other things, that a married woman, having no property of her own, cannot carry on business, and, by purchasing in her own name, or on her own credit, become the owner of the property so used, nor of property purchased with the profits resulting from such business. That, in judgment of law, such property is the property of her husband, and may be taken on an execution against her husband. But that she may buy, with her separate estate, any property she pleases, and it will be hers, and cannot be taken on such execution, and she may sell any property which she has so bought, and the consideration received will be hers.

That the husband is entitled to the services of his wife, and is bound to provide for her support.

That, in this case, the practical question is, did she (the plaintiff) purchase this property exclusively with her own money, and carry on the business without any assistance from, or interference of her husband. If she did, and if he did nothing for her support, she is entitled to recover, notwithstanding she bestowed her labor and services in and about the business, and thus added, to the extent of their value, to the profits of the business; but if she allowed her husband to interfere with the business, or to control it, or if he labored in it in carrying it on, it must be treated by you (the jury) as his property, and the defendants will be entitled to your verdict.

To the refusal of the Judge to charge as requested, and to that portion of the charge which stated that, notwithstanding she bestowed her labor, etc., she might recover, if her husband did nothing for her support, etc., as above recited, the defendants excepted.

On the trial, after the parties had both rested, and the summing up was begun, the Judge opened the case to permit proof of the value of the property taken; and it being stated by the defendants that their witnesses on that subject had left court, the Judge

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gave the defendants until the next morning to produce their witnesses on that subject.

A motion was made for a new trial, upon what precise grounds it does not appear, but the Judge at Special Term, apparently, thought that the defendant may have been surprised by this course of proceeding, in regard to the question of the value of the property, and made an order permitting a new trial, if the defendants would confine the inquiry, on such trial, to that sole question.

The defendants appealed, as well from the order made on the motion for a new trial, as from the judgment entered upon the verdict.

J. M. Eager, for respondent (plaintiff).

A. L. Pinney, for appellants (defendants).

BY THE COURT. WOODRUFF, J.—There was no sufficient ground for ordering a new trial, as upon a verdict against evidence. The testimony is, in some degree, conflicting. That of the plaintiff's principal witness, Charles Burger, is, in some particulars, contradictory of itself. The credibility of some of the testimony was in question, but, after a careful examination of the evidence, as it appears on paper, we are clear that the verdict of the jury must stand. Even though we were suspicious of the truth of the plaintiff's case, we should be constrained to say, that, with the witnesses before them, the jury were better able to dispose of the questions of fact, amid inconsistencies, contradictions and questions of integrity in the witnesses, than we are; and as the case now appears, on paper, we cannot say that a preponderance of evidence is not in the plaintiff's favor.

As to the qualification, annexed by the Judge at Special Term, it must suffice to say, that the granting of the new trial was not a matter of right, if the verdict was not against evidence, and no rule of law was violated; and upon this view the Judge at Special Term appears to have acted. No error was committed by the Judge at the trial, in opening the case, after the parties had rested: it was entirely discretionary with him to do so or not.

The permission, therefore, given at Special Term to the defend-

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ants to try the question of value further, was a mere privilege—it was not a right.

If, therefore, no error in law was committed at the trial, the judgment and the order appealed from must both be affirmed.

Whatever subdivisions may be made of the subject, there is, in truth, but one question, viz.: Where a husband does nothing for the support of his wife, may she employ her separate property in trade, bestowing therein her own time and labor, and yet retain the capital and profits as her separate estate? or does the fact, that her services are devoted to the prosecution of the business, make the whole property her husband's, or subject it to the payment of his debts?

The jury, in this case, must be taken to have found, that the property, employed by the plaintiff in her business, was purchased by her, with her separate estate received by her from her father.

That her husband is, what the witnesses have described, in terms of marked significance, an idle fellow;—

That he has, for some years, passed his time around porter-houses and beer-cellars, and does nothing for the support of his wife.

That, left in this way to provide for her own support, she has occupied herself in conducting a meat shop, and invested therein her own separate property; and if any profits have been derived from this employment of her separate property, combined with her labor, both capital and profits, now, consist in the meats which the defendants have seized, as the property of her husband, and applied to the payment of a judgment against him.

The case of *Freeman v. Orser*, decided at the General Term of this Court, in March, 1856,* must be taken to decide, that where a married woman having a separate property engages therewith in trade, and she and her husband unite their labor and services in carrying it on, living together, apparently, out of the proceeds of the business so jointly conducted, and the profits of such business are added to the capital employed, the whole property loses its separate character, and ceases to be exempt from liability for the husband's debts.

With this rule, as applied in the case then before the Court, we do not deem it necessary to contend.

* *Freeman v. Orser* (5 Duer, 476).

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Nor do we deem it necessary to refer to the authorities discussed in the opinion of Mr. Justice Slosson in that case, nor to repeat the able argument by which the conclusions are sustained.

If, in the progress of those arguments, propositions are stated which are in conflict with the right of the plaintiff to retain her verdict in this case, we think they should be understood with reference to the state of facts then before the Court, and should be limited to the circumstances to which they are applied.

With the statement of the general rules applicable to the separate estate of a married woman, and her power over it, we fully concur.

The general rule, that a husband is entitled to the services of his wife, is not abrogated by the Statutes of 1848 and 1849. But it may be plausibly, and, we think, justly insisted, that those statutes, in conferring upon her the power to receive, hold and dispose of property, as if she were a *feme-sole*, have, by necessary implication, authorized her to devote so much of her time to her separate estate as may be necessary for its care and disposal. A power to receive, hold and dispose of property, would seem to imply the right to employ therein so much of her time and labor as may be necessary, to enable her to avail herself of the benefit of the statute.

Again, the general rule, that a married woman is not competent to make contracts binding herself personally, is not altered by the statutes referred to. But, on the other hand, she could, in equity, charge her separate estate, before these statutes were passed; and she certainly has no less power, in that respect, under the acts referred to.

A married woman could not, as a general rule, become a sole trader, and enjoy the proceeds and profits of a business carried on by herself, except in virtue of a valid arrangement, amounting, in substance, to a settlement assented to by her husband. But, under such an arrangement, she would be protected in equity, and the profits of the business would be deemed her separate estate, and would not be liable for the debts of the husband. Such an arrangement was, ordinarily, effected by the intervention of trustees, and, now, it may, no doubt, be effected without that intervention.

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An agreement, made by the husband, in articles executed before marriage, in consideration of marriage, that she might carry on business on her sole account, would secure to her, her earnings in such trade, as her separate property, and those earnings would, in equity, be protected. Under the statutes referred to, trustees being dispensed with, she may, under such ante-nuptial contract, employ her separate estate in business so carried on.

A settlement, made by a husband after marriage, though binding on himself and his representatives, may be impeached by his creditors as a voluntary settlement, unless it be made upon valuable consideration. But it is not clear, that, under all circumstances, the assent of the husband to her employing her own time, in the care and management of her own separate property, is to be deemed a gift to her which creditors of the husband may impeach; still less does it follow, because her services have been so devoted to the management of her property as to have added thereto, that, therefore, her husband's creditors may treat the whole as the property of the husband, and seize it for his debts. We are not aware that the existence of the conjugal relation gives to the husband's creditors such a right to her services, that the assent of the husband may not permit her to employ them, for her own benefit, in any manner she may choose. The argument is, that, though her husband's creditors cannot compel her to labor for their benefit, still, if she do labor, and her labor is productive, although her husband assent to her enjoyment of the fruits of her labor, his creditors may dissent, and may take those earnings, in spite of both.

But there is a consideration, connected with the case before us, which may, and ought to affect the rights of the present plaintiff, in a manner not forbidden by the principles above adverted to, nor by the case of *Freeman v. Orser*.

The title of a husband to the services of his wife, is connected with his correlative duty to support her. The wife is entitled to her support, and, if her husband do not furnish it, she may earn it for herself. To this we apprehend there will be no dissent.

Again, under a statute, giving to her the right to hold, and enjoy, and dispose of her own property, and the rents, issues and profits thereof, as if she were a *feme-sole*, she has the clear right to invest that property as, in her discretion, she sees fit; and

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if such investment be productive of profits, the profits are her own; and we think it equally clear, that she may intrust it to a third person to trade therewith, and account to her for the profits.

And if her husband do not support her, and she is, therefore, put to the necessity of employing her own labor to obtain a support, we perceive no reason, in equity, why she may not devote that labor to the care and management of her separate property, making it thereby productive for her own maintenance.

This is no new doctrine. Though a husband could not, after marriage, make a voluntary settlement of property upon his wife which creditors might not impeach; yet, it is said, that if a husband agree, in articles before marriage, that his wife may carry on business on her sole account, or if he permit her to do so afterwards, what she earns will be her sole and separate property, subject only to such demands arising in the trade which should properly be charged upon it. And the case of a married woman deserted by her husband, seems to us to be, in principle, like the present; for, surely, in a court of equity, it can make little difference whether a husband departs, abandoning his wife altogether, or neglects his duty to support her, spends his time at porter-houses and dram-shops, virtually abandoning her, and adding to her trial the mortification of sharing in some degree his disgrace.

The case of *Cecil v. Juxon*, (1 Atk. 278,) is an example of desertion. The husband deserted his wife and children, and went abroad. Her friends provided her with goods with which to carry on business as a milliner, and permitted her to take the profits. Out of her savings, she lent money and received notes. After an absence of some years, the husband returned, possessed himself of the goods used in her trade, and of the notes received for her loans. The Court of Chancery, on her application, declared, that she was entitled to them, as her separate property, and decreed accordingly.

See this subject discussed, and other cases referred to, 2 Roper on Husband and Wife, p. 171-2, etc.

We conclude, with saying, that this case is distinguishable from *Freeman v. Orser*, in this, that there the business was carried on by the husband and wife jointly, though in the wife's sole name. The earnings of the wife were not distinguishable from those of her husband; it was impossible to identify her sole and separate

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property; it had been absorbed in the business, and blended with his and her earnings.

We think, that where a husband does nothing for the support of his wife, and she, having separate property, employs herself in trading therewith, with his knowledge and assent, he neither assisting nor interfering therewith, such property does not become, in equity, liable for his debts. It remains, with its proceeds and profits, her sole and separate property.

This Court, being bound by the rules of equity, as well as of law, are bound to recognize the equitable rights of the plaintiff in this respect.

It follows, in our judgment, that there was no error in the Judge's charge, of which the defendants can complain. The Judge went very far in their favor when he said, that, "if she allowed her husband to interfere with the business," the property must be treated as his property.

The judgment and order appealed from must both be affirmed.

LEVY v. CAVANAGH, Receiver, etc.

When the owner of goods delivers them to an auctioneer to be sold on his account, being, at the time, a clerk and book-keeper of the auctioneer, and the auctioneer, with the knowledge of such owner, and without objection from him, deposits, from time to time, the proceeds of such sale, and the proceeds of sales for others, and all moneys he receives, to his general credit in bank, and draws, from time to time, against such deposits, checks to pay debts owing to his customers, and his general expenses, such owner will be deemed to have assented to that course, and he will become a general creditor of the auctioneer, having such rights as the other general creditors, and no greater.

A receiver of the property of such auctioneer, duly appointed, in proceedings against him supplementary to execution, will, as such, be vested with the legal title to the moneys on deposit, and be entitled to payment of them by the bank, in preference to the creditors owning the goods, the proceeds of which have been so deposited.

A check drawn by such auctioneer, in favor of such owner, on such bank, for the amount of the proceeds of his goods, after such appointment of the receiver has been perfected, and notice thereof given to the bank, and an assignment of an amount of such deposit equal to the amount of such check, will give such owner

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no right of action against the bank, nor any right to the moneys on deposit, they having been paid into court, to abide the result of a suit to determine the relative right of such owner, and of such receiver to them.

When such owner, in an action against the receiver to enforce his claim to, and to recover such moneys, as part of the case made by his complaint, states the drawing of the check and the making of such assignment, and a demand of the moneys by virtue thereof, and proves such facts by such assignor on the trial, is the plaintiff in the judgment on which, and for whose benefit such receiver was appointed, admissible as a witness, in such action, for such receiver?

(Before DUNN, Ch. J. and WOODBURY, J.)

Heard, October 5, and decided November 14, 1857.

THIS action comes before the Court, at General Term, on a verdict ordered to be taken in favor of the plaintiff, for the amount of his claim, subject to the opinion of the Court on a case to be made, and directed, at the trial, to be heard in the first instance at the General Term. It was tried in December, 1855, before Ch. J. Oakley, and a jury. The action was commenced against the Union Bank, as defendant.

The plaintiff seeks to recover the amount of a check, drawn by Edward Schenck, on the Union Bank, for the sum of \$138, and dated January 23d, 1855. It was presented on that day to the bank for payment, which was refused. Schenck then executed a written assignment to the plaintiff of the check, and of a like sum standing to his credit on the books of the bank, reciting, that this amount was due for goods of the plaintiff, which Schenck had sold as auctioneer, and the proceeds of which he had deposited in such bank. The said check and assignment were both presented, and payment again demanded and refused. On the 18th of said January, the defendant, on proceedings supplementary to execution against said Schenck, was duly appointed a receiver of all his property, and, on the 20th of said January, gave notice thereof to the Union Bank. On petition of the Union Bank, Cavanagh, as such receiver, was substituted as defendant, and answered the complaint, claiming the moneys on deposit, as such receiver. The complaint alleged the making and presentment of the check, the execution of the assignment, and presentation of that; a demand of payment on each occasion, and a refusal to pay it. On the trial, Edward Schenck was sworn, as a witness on the part of the plaintiff. He was objected to as incompetent, on the ground that the action was brought for his immediate benefit, which ob-

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jection was overruled, and the defendant excepted. He proved the check and assignment, and they were read in evidence. That, being a licensed auctioneer, he sold, during January, 1855, various articles for the plaintiff, the whole amount being \$138. That the check and assignment were given for this \$138. That these moneys, and the other moneys which he received in the prosecution of his business, were deposited, promiscuously, to his general credit in the Union Bank. Such deposits, commencing on the 2d of December, 1854, and continued to a date subsequent to the deposit of the moneys received on the sales of the plaintiff's goods, were twenty-seven in number, and amounted to \$8,457.89. The smallest deposit made in January, 1855, was \$100.40, and the next smallest was \$183. The plaintiff frequently went to the bank with Schenck's bank-book, and made the deposits. He was, at the time, in the employment of Schenck, as book-keeper. Schenck, from time to time, drew against such deposits, to pay his customers and his personal expenses.

When the plaintiff rested, the defendant moved for a dismissal of the complaint, on the grounds, that neither the check nor the assignment, nor both together, gave to the plaintiff a right to the money; and that the deposit of the moneys received for the plaintiff's goods, being a general one, and the moneys being thereby mingled with other moneys, their identity was lost, and could not be traced so as to entitle the plaintiff to recover. The motion was overruled, and the defendant excepted.

The defendant then proved his appointment as such receiver, by an order dated the 18th of January, 1855, and the service of a certified copy thereof on the Union Bank, on the 20th of January, 1855, with a notice, in writing, that it was such a copy, and demanding payment to him, as such receiver, of the moneys deposited by Schenck with the bank, to the amount due to the plaintiff in the action in which he was such receiver, being about \$550, including interest and costs.

Patrick Monaghan, such plaintiff, was then offered as a witness for the defendant, and was rejected, as being the party for whose immediate benefit this action was defended. The testimony being closed, the defendant renewed his motion to dismiss the complaint, which was denied, and he excepted. A verdict was then ordered for the plaintiff, as already stated. On a case showing

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these proceedings to have been had, the action now comes before the Court, at General Term, for its judgment.

E. Pierrepont, for plaintiff.

F. Byrne, for defendant.

BY THE COURT. DUER, Ch. J.—We are clearly of opinion, that, upon the evidence given on the trial, the plaintiff was not entitled to recover, and that when the parties rested, the complaint ought to have been dismissed, or the Judge should have instructed the jury to render their verdict for the defendant.

It may be admitted, that the moneys arising from the sale of the plaintiff's goods, so long as they remained in the hands of Schenck, the auctioneer, and could be identified, were as much the property of the plaintiff as the goods of which they were the proceeds. But, if the plaintiff permitted Schenck to treat the moneys as his own, by blending and mixing them with his own funds, or those belonging to other persons, so that they could no longer be traced and identified, he thereby gave credit to Schenck for their amount, and from that time his claim against the latter was in no respect distinguishable from that of an ordinary creditor. It became, in effect, a loan to Schenck of the sum received by him, payable on demand.

We think that the proof in this case was conclusive, to show that such were the facts. The plaintiff made no demand of the proceeds of his goods when they were received. He was in the employ of Schenck, not merely as his clerk, but as his book-keeper, and sometimes went with the bank-book to make deposits on his account. He, therefore, knew that it was the custom of Schenck to deposit in his own name, and to his own credit, all the moneys that he received from sales, including his own commissions, and to draw upon this common fund, not only for payments to his customers, but for his own personal expenses. With this knowledge he must be deemed to have assented, by his silence, to the deposit that was made of his own funds; and there is no pretence for saying, that the deposit so made created any privity, in law or in equity, between him and the bank. Its only effect was to

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make Schenck the creditor of the bank, and himself the creditor of Schenck.

When an auctioneer sells the goods of a principal, under an immediate duty, to pay over the proceeds, if, without the knowledge or assent of his principal, he deposits those proceeds in a bank to his own credit, we do not doubt that a court of equity would interfere and restrain the fraudulent agent from applying the funds to his own use, and would even hold, that the principal was entitled to receive them in preference to other creditors. But where there is no allegation nor proof of fraud, and, *a fortiori*, when the proceeds of a sale are so deposited with the knowledge and assent of the principal, there is no precedent nor principle that could justify such an interference of a court of equity on his behalf.

We have, therefore, no difficulty whatever in holding, in the present case, that the whole fund, including the deposit of the moneys of the plaintiff standing to the credit of Schenck on the books of the Union Bank, on the 11th day of January, constituted a debt due to him from the bank, and that the whole title to this debt, both in law and equity, was transferred to, and became vested in the defendant on that day, by force of his appointment as receiver. Notice of his appointment was given to the bank on the 20th day of January; and consequently, if, after that day, the bank had paid to the plaintiff, as holder of the check, or as assignee of Schenck, the sum which he demanded, the payment would have been made, in its own wrong, of money belonging to the defendant and the creditor whom he represents.

We add a few words, to guard against a conclusion, that might otherwise possibly be drawn from our decision. We are not to be understood as saying, that when an auctioneer deposits in a bank, in his own name, the proceeds of goods entrusted to him for sale, with the mere intent, and as the mode of providing for their safe keeping until their payment shall be demanded, a court of equity would not protect the entire fund for the benefit of the owners of the goods, not only against its misapplication by their agent, but against the claims of other creditors. But where, without any fraudulent intent, or violation of instructions, the moneys are not only placed to the credit of the agent in his general ac-

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count, but that account embraces as well the moneys used by him for his own personal expenses, as the proceeds of goods sold; and all the moneys received by him, from whatever source, are mixed and blended together in their mode of deposit. The sole relation in which he then stands is, that of creditor of the bank, and of debtor to the owners of the goods. Nor have those owners any remedy against him or the funds deposited, except such as may belong to them in common with all other creditors, or may be acquired by their superior diligence.

It remains, only, to notice the exceptions that were taken to the admission of Schenck as a witness, and the rejection of Monaghan, the judgment creditor, upon whose application the defendant was appointed receiver. The first exception is so plainly untenable, that it requires no observations; and we think that the second, for the reasons that I shall briefly state, was also groundless.

The defendant asserts his title, as receiver, for the sole benefit of Monaghan. His relation to Monaghan is that of an agent, acting under an immediate duty to pay over to him, as principal, the moneys which, as receiver, he is authorized to collect. It is true, he acts under the authority, and subject to the control of the Court or Judge by whom he was appointed; but the right of Monaghan, as the judgment creditor, upon whose application he was appointed to receive the moneys he may collect, is indisputable. Monaghan was, therefore, offered as a witness to prevent the recovery of money to which, if the legal title is adjudged to belong to the defendant, he, as a sole *cestui que* trust, will be immediately entitled. He was, therefore, properly rejected, according to the decisions in this Court, in *Cutlin v. Hansen*, (1 Duer Rep. 329,) and *St. John v. The American Mutual Life Insurance Co.*, (2 Duer, 419).*

* Is it clear, that Monaghan was rightly excluded as a witness, even conceding that the action was defended for his immediate benefit. If Schenck, a witness for the plaintiff, is the assignor of a thing in action, and that thing in action was the subject of the action, then Monaghan could have been examined in his own behalf, unless he is to be excluded merely because he is not, nominally, a party to the action. If an actual party to the action, and the only person interested as a defendant, he could have been examined, simply, because the plaintiff had examined the assignor of a thing in action, in a suit to recover the thing so assigned, or its equivalent. (Code, § 399.) But, by § 398, Monaghan's right to be examined was as perfect as if he had been a party to the action. The plaintiff sought to re-

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It is, perhaps, doubtful, from the form of the case, as before us, whether we have authority, now, to render judgment for the defendant, dismissing the complaint. We think the safest course will be, to set aside the verdict, and order a new trial; but if, upon a second trial, no additional and material facts shall be proved on the part of the plaintiff, the defendant will be entitled to judgment.

New trial ordered; costs to abide the event.

TAYLOR and others, Plaintiffs and Appellants, v. THE ATLANTIC MUT. INS. CO., impleaded, etc., Respondents.

When a vessel, along-side of a public pier in the city of New York, is, accidentally and without fault of her owner, burned, and sinks to the bottom, near the mouth of the slip or basin, thereby so obstructing the slip and bulkhead as to prevent other vessels coming in; those entitled to the slippage, or wharfage, cannot recover for the loss thereof, caused by such obstruction, from the owner of such vessel, without showing that such owner, by due care and attention, could have removed the wreck, or, at least, have shifted its position so as to prevent its being a cause of injury, and that he is in default for not having done so. *Held*, that the allegations of the complaint in this action did not show any such ability, on the part of the owner, or any such default.

Held, also, that an insurance company, which had insured an undivided interest in such vessel, and had accepted an abandonment, made by such insured owner, after the vessel was so burned and sunk, was not liable for loss of slippage, or wharfage, caused by such obstruction, it not being alleged that, by due care and attention, it could be removed.

Such piers and bulkheads are open to the common use of the public, for any purposes connected with the loading, unloading or repairing of vessels, and securing

cover, partly, by force of the check's operating as an assignment, and by force of the assignment of \$138 of the moneys on deposit, actually made. He gave both in evidence, and proved them, by Schenck, his assignor. Unless it can be said, that he rested his right to recover, solely or substantially, on the ground, that the moneys deposited, to the amount of \$138, were his property, because they were the proceeds of his goods, and no claim was made, based on the fact of the assignment, then it would seem that his examination was that of an assignor of a thing in action, and that such examination gave the right to Monaghan to be examined, in his own behalf, to the same matters to which Schenck had been examined. It is proper to observe, however, that there is nothing, in the printed points, furnished to the Court on the appeal, which indicates that any of the views here presented were suggested to the Court on the argument.

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their cargoes, whether in vessels afloat or sunk, not prohibited by statute or the lawful ordinances of the Common Council. And such a use, when it neither encumbers the bulkhead or pier, so as to incommodate the loading or unloading of vessels, or the passing or repassing of carts, nor in any way injures the structure itself, gives no right of action to the party entitled to slippage and wharfage. Hence, a use of the slip in attempting to raise the vessel and recover the property in it—especially as such attempt was made at the request of the plaintiffs—was held to create no liability to make compensation for such use, as no facts were stated showing such use to be wrongful, or an invasion of the plaintiffs' rights, or a violation of any duty which the defendants owed to them.

(Before DUNN, Ch. J., and BOSWORTH, and WOODRUFF, J. J.)
Heard, October 24th; decided, November 14th, 1857.

THIS action comes before the Court at General Term, on an appeal by the plaintiffs, from an order made by Mr. Justice Hoffman, on the 8th of January, 1857, sustaining a demurrer interposed by the Atlantic Mutual Insurance Company, to their complaint, and directing judgment to be entered in favor of the defendants so demurring, with liberty to the plaintiffs to amend their complaint, within twenty days after notice of such order. Moses Taylor and others are plaintiffs, and The Atlantic Mutual Insurance Company, and six other insurance companies, which are named in the body of the complaint, and Loftis Wood, Richard Eccles and William H. Webb are the defendants. The complaint and demurrer, exclusive of the title of the action, are as follows:—

"The complaint of the above-named plaintiffs states, that the pier, No. 29 East River, in the City of New York, was, on the 26th of December, 1853, and still is, owned, one undivided half part thereof by the plaintiffs, and the other undivided half thereof by the Corporation of the City of New York. That the plaintiffs are the owners of the bulkhead or wharf, and water-right, on the west side of said pier No. 29. That, by an agreement between the plaintiffs and said Corporation, prior to the date last mentioned, the plaintiffs above named were, thereafter, and still are, entitled to receive all the wharfage, slippage, advantages, or revenues derivable from the west side and half of said pier, and from said bulkhead, and the said Corporation, of the east side and half of said pier. That, on the west side of said pier, is a slip or basin extending out from said bulkhead about 470 feet, of which the plaintiffs have been, and still are entitled to the free and unob-

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structed use, where vessels of all sizes have been accustomed to enter and remain along the west side of said pier, and along said bulkhead, and receive and discharge cargoes, being liable to pay wharfage to the plaintiffs, and the plaintiffs being authorized to charge and collect wharfage at fixed rates, according to the tonnage of the vessel. That the ship Joseph Walker, in the usual course of business, for several days prior to the date aforesaid, had been made fast along the west side of said pier, and had been receiving on board a cargo, composed mostly of cotton, resin and grain, being liable to pay to the plaintiffs a per diem wharfage. That, on the night of the said 26th day of December, 1853, the said Joseph Walker was, in a few hours, accidentally burnt to the water's edge, and sunk, in her position along the west side of said pier, near the mouth of the slip or basin, in about thirty feet of water, at medium tide, carrying down with her a large part of her cargo, spars, etc., and so obstructing the slip and bulkhead as to prevent other vessels from coming in. That several of the owners of the Joseph Walker, and who, in the aggregate owned $\frac{3}{4}$ parts thereof, had insurance on their interests in said ship, as follows:—in the Atlantic Mutual Insurance Company, \$ on $\frac{1}{4}$ parts of the ship; in the New York Mutual Insurance Company, \$ on $\frac{1}{4}$ parts; in the Reliance Mutual Marine Insurance Company, \$ on $\frac{1}{4}$ parts; in the Astor Mutual Marine Insurance Company, \$ on $\frac{1}{4}$ part; in the Sun Mutual Insurance Company, \$ on $\frac{1}{4}$ part; in the Union Mutual Insurance Company, \$ on $\frac{1}{4}$ parts; in the Mercantile Mutual Insurance Company, \$ on $\frac{1}{4}$ parts; and that the remainder of said Joseph Walker was not insured, and was owned as follows:—Loftis Wood, Richard Eccles and William H. Webb, each owned $\frac{1}{4}$ parts thereof. That, immediately upon the sinking of the Joseph Walker, the owners who were insured as aforesaid abandoned the wreck, so far as they were concerned, to the above-mentioned underwriters, who thereupon accepted of the abandonment in due form, so as to vest the ownership of the property so insured in said underwriters. That, after several weeks of unnecessary and unreasonable delay, and while said wreck was so sunken, as aforesaid, the defendants agreed, with one Captain Bell, to raise and recover the said wreck and property so sunk, or such part thereof as he could, for the benefit of the defendants, and to

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remove the same; and that he should have from them, as compensation therefor, 75 per cent of what the property recovered might bring at auction sale, the defendants to have the balance. During the spring, summer and autumn of 1854, various efforts were made by him in pursuance of the agreement, and others who who acted under said agreement, and at the instance of the defendants, to raise and secure the said wreck and property of the defendants; that, as a means for so doing, they brought into the said slip, and kept there, for several months, three or four other vessels, or hulks, and various machinery and fixtures, so as almost wholly to close up the slip and bulkhead, and encumber said pier, and render said slip, and pier, and bulkhead nearly valueless to the plaintiffs, during the time, for the usual purpose of wharfage or revenue, or for other purposes, some of which other hulks, machinery and fixtures have also been sunk in said slip, when so employed, where they yet remain in the way also of vessels; that the wreck of the Joseph Walker, and said other obstructions still remain sunken on the bottom, in said slip, near said west side of said pier, and to the great injury of the plaintiffs; that the defendants have not attempted to remove the said wreck, as they were in duty bound to do, and as the plaintiffs have often requested them to do, from the said slip, but have wrongfully, and in violation of the plaintiffs' rights, made use of the said slip, and pier, and bulkhead as a working place, when they could raise the said wreck so as to enable them to secure and remove the spars, rigging, iron, timbers and other such property connected with said wreck; that the defendants, as the legal owners of the said wreck, have been guilty of great and unreasonable negligence and delay in the removal of the said wreck and obstructions, whereby the plaintiffs' accustomed revenue derivable from the said pier and dock, or basin, has been greatly interfered with and injured, and has been greatly lessened from the fair and usual amount thereof, and the plaintiffs have suffered great and lasting injury and damages, to the amount of ten thousand dollars. The plaintiffs, therefore, demand judgment against the defendants, in the sum of ten thousand dollars, besides interest and costs of action."

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DEMURRER.

"The defendants, The Atlantic Mutual Insurance Company, demur to the complaint, and specify the grounds of objection to the complaint—1. That there is a defect of parties. 2. That the Mayor, Aldermen and Commonalty of the City of New York are necessary to be made parties to the action as defendants. 3. That the complaint does not state facts sufficient to constitute a cause of action. 4. That the complaint does not show any obligation, or duty, in these defendants, for the non-performance of which these defendants are liable. 5. That the complaint does not show any fault of these defendants, in the sinking of the ship Joseph Walker and cargo where she was sunk, or in preventing the plaintiffs from removing the same, if they desired. 6. That the complaint does not show that these defendants were in the possession, or control, of the ship Joseph Walker, or could have removed the same. 7. That, from the complaint, it appears that the duty of removing the obstruction to the wharf and slip, by the sinking of the Joseph Walker, in law, rests on the plaintiffs or on the Mayor, Aldermen and Commonalty of the City of New York, and not on the owners of the said ship Joseph Walker, or on these defendants, in whole or in part. On all which grounds of demurrer these defendants insist that the complaint should be dismissed, with costs and a proper allowance to these defendants."

N. Merrill, for plaintiffs and appellants.

Daniel Lord, for defendants and respondents.

BY THE COURT. BosWORTH, J.—The complaint does not allege that the wreck of the sunken vessel can be removed. It states, that various efforts have been made to raise it, and that some of the hulks, machinery and fixtures, employed in the efforts made to raise it, have also been sunk, in the slip, while so employed. It is not alleged that the hulks, machinery and fixtures were sunk by reason of any negligence or want of skill, in the persons employed, nor that they were not appropriate instrumentalities for the removal of the wreck.

In *White v. Crisp*, (26 Eng. Law & Eq. R. 532,) the Court con-

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strued the allegations of the complaint to mean, that, up to and at the time of the injury complained of, "the defendants, to whom the sunken ship had been transferred, exercised the possession, control, and management, and direction thereof."

Of that construction, the Court remarked: "Now, we understand by this, that the defendants had it in their power, by due care and exertion, to have altogether removed this vessel, or to have shifted, at least, its position, and so might, reasonably, have been able to have prevented the injury. If these words do not mean this, we think there was no liability on the part of the defendants." We consider this a correct statement of the rule of liability, in a case like the present, and that none of the cases cited conflict with it.

There are no words, in the complaint in this action, which can be deemed to import, that the defendants could have raised or removed the wreck of the Joseph Walker, unless the averments, that, "during the spring, summer and autumn of 1854, various efforts were made by him," (Captain Bell,) "and others who acted under said agreement, at the instance of the defendants, to raise and secure the said wreck," imports it. But the complaint, while it does not allege that these efforts were not as well devised and efficient as any that could, reasonably, be made, also states, that this vessel sunk in about thirty feet of water, at medium tide, and still remains sunken on the bottom, with the hulks, machinery and fixtures, which were also sunk, in the efforts made to raise her. These statements do not favor an inference that the wreck could be removed.

The complaint further states, that "the defendants have not attempted to remove the said wreck, as they were in duty bound to do, and as the plaintiffs have often requested them to do, from the said slip." But no facts are stated, as creating a duty to remove the wreck, except that the vessel was burned, by accident, and sunk to the bottom, and that various unsuccessful efforts had been made to raise it. The allegation, that it was their duty to remove the wreck, is of no importance, in the absence of averments, that it could be removed by the defendants, and that they retained the control and management of it.

There is no allegation, in the present complaint, in those terms, or of that import. The plaintiffs' request, that the defendants

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should remove the wreck, would not, of itself, create a duty or liability.

We think the complaint does not state facts enough to show that the vessel could be removed, and, consequently, not enough to make it the duty of the defendants to remove it.

For these reasons, the further allegations, "that the defendants, as the legal owners of the said wreck, have been guilty of great and unreasonable negligence, and delay, in the removal of the said wreck and obstructions, whereby," etc., neither of themselves, nor in connection with the preceding averments relating to the same point, constitute a cause of action. Negligence in not removing, or delay in removing that which it is not shown can be removed, cannot be imputed to the defendants.

It being affirmed that the vessel was burned by accident, and sunk to the bottom, the defendants, to whom she was subsequently abandoned by her insured owners, are not liable to the plaintiffs for any loss of wharfage which they have consequently suffered, until the defendants are shown to be under an obligation to remove the vessel, and to be in default for not having done so. There are no facts, stated in the complaint, sufficient to support either of those conclusions. *Hancock v. The York and C. Railway*, (10 Com. Bench Rep. 349.)

No fault can be imputed to either of the insurance companies, arising from, or which caused, the sinking of the vessel. They had no agency in producing that result, and were not interested in the vessel, as part owners, until after she had been abandoned to them by the owners of $\frac{2}{3}$ parts thereof, and subsequently to her being sunk.

The only other allegations, which it can be pretended constitute a cause of action, are to the effect that the defendants "have wrongfully made use of said slip, and pier, and bulkhead, as a working-place when," (or whence,) "they could raise the said wreck, so as to enable them to secure and remove the spars, rigging, iron, timbers, and other such property connected with said wreck."

It will be observed, that this clause of the complaint characterizes the use made of the slip as being as truly wrongful as that made of the pier and bulkhead. The wreck could not be removed or raised without using the slip. Whether it could be

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done, if at all, without using the pier and bulkhead, the Court cannot so clearly see. It is not affirmed that proper efforts could be made as efficiently, without using the pier and bulkhead as with using them, nor that effectual efforts could be made without using both. The complaint states, that the plaintiffs have often requested the defendants to remove the wreck from the slip, and that, during the spring, summer and autumn of 1854, Capt. Bell, and others, acting under the agreement made between him and the defendants, and at the instance of the latter, made various efforts to raise the wreck.

Such a request gave the defendants the right to employ all means to raise the wreck which they, in the honest exercise of their discretion, deemed best adapted to ensure success, and to make any use of the slip, pier and bulkhead which they deemed necessary, and to which means and use the plaintiffs tacitly assented, by not objecting to it.

The piers and bulkheads are open to the common use of the public, for any purposes connected with the loading and unloading of vessels, the repairing of vessels, and the unloading and securing of their cargoes, whether they be in vessels afloat or sunk, not prohibited by statute, or the lawful ordinances of the Common Council, in relation to the manner of using them. Even if it cannot be, justly, said that the rights of the owners of wharves and piers are created by statute, it may be said that they are dependant upon statutory law, which defines and regulates these rights with great minuteness and detail.

The owners of piers and bulkheads have the right to demand wharfage, slippage and cranage from vessels having the use, which, by statute, makes them liable to pay. (Davies' Laws, p. 551, §§ 212, 213, 215, 218, 224, 228, 230 and 231.)

For discharging "any ballast, consisting of earth, gravel or stones into a dock, or on a wharf, without the consent of the owner thereof, a penalty is given by statute, and when it has been so discharged, without consent, if it is not removed, after the receipt of a written notice to remove it, the owner of the vessel from which it was discharged is liable to pay the same wharfage, daily, as such vessel would be liable to pay." (Davies' Laws, p. 558, § 233.)

If any wharf shall be encumbered with lumber or other prop-

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erty, so as to incommod the loading or unloading of vessels, or the passing or repassing of carts, the owner is required to give written notice, to the owner of the lumber or other property, to remove it in a reasonable time; and if they be not removed, the owner of the wharf may remove them, and keep them in his custody until the charges of removal and storage be paid. (*Id.*, § 235, and see § 234.) All the statutes, in relation to wharfs and piers, import a right to the public to use their top surface, without charge, for any purpose necessarily or properly connected with the loading, unloading or repairing of vessels, without being liable for such use, when it is a use not prohibited by statute or the ordinances of the Common Council.

It is the right of the owners of the sunken wreck to recover and remove so much of their property as they may be able. The fact, that the slip, pier and bulkhead are used for that purpose, is not, of itself, wrongful, nor does it, as a matter of course, entitle the owners of the wharf and pier to be paid for such use.

In order to understand what wreck the defendants have attempted to raise, and in which attempt it is alleged they have wrongfully made use of the slip, pier and bulkhead, and in what manner it is charged that said use has violated the plaintiffs' rights, we must look at the other parts of the complaint.

In looking at the other parts of the complaint, with this view, we find it stated, that this wreck was sunk, by accident, in water thirty feet deep at medium tide, and remains on the bottom; that it is sunk near the mouth of the slip or basin, and so obstructs the slip or bulkhead as to prevent other vessels from coming in, and, of course, rendering it impossible for the plaintiffs, while that obstruction continues, to entitle themselves to wharfage from other vessels; that the defendants were often requested to remove the wreck from the slip, and that various and unsuccessful efforts to raise it were made during the spring, summer and autumn of 1854.

The use alleged to be wrongful, and in violation of the plaintiffs' rights, is a use of the slip, pier and bulkhead as a working place, so as, and with intent, to secure and recover the property. It is not charged, that this use incumbers the bulkhead or pier, so as to incommod the loading or unloading of vessels, or the passing or repassing of carts; nor that any notice to desist from such use,

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or to remove from the bulkhead and pier the property or articles placed on them, in connection with using them as a working place, if any have been so placed, has been given.

The complaint, in its specification of the consequences of all that the defendants have done or omitted to do, concludes by charging, that "the defendants, as the legal owners of the said wreck, have been guilty of great and unreasonable negligence, and delay, in the removal of the said wreck and obstructions, whereby the plaintiffs' accustomed revenue, derivable from the said pier and dock, or basin, has been greatly interfered with and injured, and has been greatly lessened, from the fair and usual amount thereof, and the plaintiffs have suffered great and lasting injury and damage, to the amount of \$10,000."

On the whole complaint, it must be deemed to be true, that the use of the pier and bulkhead as a working place, to raise the wreck and recover the sunken property, has neither prevented the plaintiffs from earning wharfage, nor diminished their revenues from that source. This must be deemed to be true, because the complaint states, that the sunken wreck so obstructs the pier and bulkhead "as to prevent vessels from coming in."

It is not alleged that the use of the bulkhead and pier, as a working place, incommodes the passing or repassing of carts, or the loading or unloading of any vessel that may have been fastened to the end of the pier, or to any part of the bulkhead or pier which may be accessible to any vessel liable to pay wharfage.

We are of the opinion that the defendants have a right to use the pier and bulkhead to recover their sunken property from the slip. That the mere fact of using them, irrespective of the character and extent of the use, is not wrongful, nor a violation of the plaintiffs' rights. And that unless it be made to appear that the use made of them incommodes the loading or unloading of vessels, or the passing or repassing of carts, or injures the pier or bulkhead itself, no right of action can be based on such use. And inasmuch as the complaint shows that there is an obstruction in the slip, for the existence of which the defendants are not responsible, and which prevents vessels from entering the slip, and thus establishes that it is impossible for either the pier or bulkhead to earn wharfage, it fails to establish, by means of the allegations now under consideration, a cause of action.

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A use of the slip under such circumstances, and for the purpose for which the complaint states it was used, being lawful, something more is essential, to a good complaint, than an averment that it was used wrongfully, and in violation of the plaintiffs' rights.

The idea of the pleader seems to have been, that the use itself was wrongful, and in violation of the plaintiffs' rights, merely because it was used as a working place, for the purpose of recovering the property, and not of removing the wreck.

But a use in that way, for such a purpose, violates no right of the plaintiffs, and the allegation that it was wrongful, and in violation of the plaintiffs' rights, is not an allegation of a fact, but is the pleader's view of the nature of the acts which he describes.

We think the order appealed from should be affirmed, with costs.

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When the Bond of Submission, by which the parties thereto submit the matters in difference between them to the decision of arbitrators, provides that the award must be in writing, and ready to be delivered on or before the 1st of January, 1848, and the time for the delivery of the award is extended by successive agreements, in writing, signed and sealed by the parties, the last of which is dated the 1st of June, 1850, and by it, it is agreed that "the time for the parties to close their arguments, on the arbitration under the annexed bond, is hereby extended to the 12th day of June instant; and the time for the arbitrators to make and deliver their award, on said bond, is hereby extended to the first Monday of July next." At a meeting of the arbitrators, on the 7th of June, it was agreed, by the respective parties, that both parties should close their arguments on the 14th of June; and the counsel for the defendant, one of said parties, summed up on the said 14th of June, and the arbitrators adjourned until the 19th of said June, and then heard the counsel for the other party sum up, against the objection of the defendant thereto, made at the time. *Held*, that the arbitrators exceeded their powers, and that their award was void, for that cause. The agreement of the parties, as to the time within which the arguments were to be closed, prescribed a limit to the powers of the arbitrators in that respect, and by hearing the argument on the 19th of June, they transcended their authority, and their award is void, however just it may be in principle. One of the arbitrators is a competent witness to impeach his award, by giving testimony of facts, they being open, and having transpired in the presence of the parties, and of their counsel.

A complaint, upon an award, which directs one party to pay to the other a sum named, on demand, and provides, that on payment by the one of that sum, and the receipt of it by the other, each shall execute and deliver to the other a re-

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lease, in full, of all claims and demands, from the beginning of the world to the date of the submission, unless it avers the delivery, or tender of such a release, by the party to whom the sum is awarded to be paid, or an offer to deliver the same, on payment of the sum so awarded, does not state facts sufficient to constitute a cause of action, notwithstanding it avers a demand of payment, and a neglect and refusal by the defendant to pay the sum awarded.

This objection can be taken on an appeal from the judgment, although it was not taken at the trial; and although the allegations of a demand of payment, and of the neglect and refusal to pay, are not controverted by the answer.

(Before DURE, Ch. J., and WOODRUFF, J.)

Heard Oct. 12; decided Nov. 21, 1857.

THIS action comes before the Court at General Term, on questions of law which, at the trial, were ordered to be there heard in the first instance. It was tried, in May, 1856, before Mr. Justice Bosworth and a jury, when a verdict was taken in favor of the plaintiff, for \$13,228.73.

The action is brought upon an award, made under a submission of matters in controversy to arbitrators, the parties to the submission being John Allen and the defendant. Whether the arbitrators exceeded their powers, and whether the complaint states facts sufficient to constitute a cause of action, being the only questions of substance decided by the Court, only so much of the case and proceedings will be stated as affects their correct determination.

The complaint states the existence of claims and controversies between Allen and the defendant, the submission of them to arbitrators by a bond, dated the 26th of October, 1847, which bond made it essential, to the validity of any award under it, that it be made on or before the 1st of January, 1848. That such time, by the written and sealed agreement of the parties, was extended to the 1st of July, 1850, on which day an award was made, and published, that the defendant should pay Allen \$9,402.25 on demand, "and, further, that on the payment, by the said defendant, and the receipt, by the said Allen, of the said sum, that they, the said Allen and the said Blunt, shall, in due form of law, execute and deliver, each to the other, a general release, sufficient in the law for the releasing, by each to the other of them," all claims, demands, etc., from the beginning of the world to the 26th of October, 1847. It then alleges, that the defendant did not, nor would, "although the same was duly demanded of him," to

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wit., on the same day, "nor at any other time, although the same has been frequently since demanded of him," pay the same, "but to do so, hath wholly failed and made default." It then alleges an assignment of the award to John B. Vail, on the 23d of September, 1850; and by Vail to the plaintiff, on the 24th of September, 1850, that the moneys, so awarded, are all owing to the plaintiff, and unpaid; and then avers, "that, afterwards, to wit., on the day and year last aforesaid, he (the plaintiff) demanded payment of said sum of said defendant, but he to pay the same, or any part, wholly neglected and refused, and still does neglect and refuse."

It then avers, that Allen duly executed such a release as the award prescribes, and that the plaintiff holds it ready to be delivered, on the defendant's paying the said sum, and complying with the provisions of said award, and prays judgment for \$9,402.25, with interest from July 1, 1850.

The answer, by not denying, admitted the allegations of a demand of payment, and of a neglect and refusal to pay, but alleged various matters, by way of impeaching the validity of the award, one of which was, that the arbitrators exceeded their powers, by hearing an argument from the counsel for Allen, after the 12th of June, 1850.

It appeared on the trial, that, from time to time, Allen and the defendant, by written agreements, signed and sealed by them, had extended the time within which the arbitrators might make an award. The last of them is in these words, viz.:—

"The time for the parties to close their arguments, on the arbitration under the annexed bond, is hereby extended to the twelfth day of June instant, and the time for the arbitrators to make and deliver their award, on the said bond, is hereby extended to the first Monday of July next.

"Witness our hands and seals, the first day of June, 1850.

"JOHN ALLEN, [L. S.]
"J. BLUNT. [L. S.]"

When the plaintiff rested, the defendant moved to dismiss the complaint on three grounds: *first*, of a "variance between the award produced, and that described in the complaint;" *second*,

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"that no release had been tendered to the defendant, pursuant to the award;" and *third*, "that the assignment showed, that judgment had been entered on the award." The motion was denied, and the defendant excepted.

One of the referees was sworn, and testified against the objection and exception of the plaintiff's counsel, that the defendant summed up in his own behalf on the 24th of October, 1849. That Edward Sandford first appeared as counsel in the matter on the 7th of June, 1850, when it was agreed by the respective parties, that both parties should close their arguments on the 14th of June, to which day the matter was adjourned, and on that day, William Kent summed up for the defendant, Mr. Sandford not being present, but Mr. Allen attending, and requesting an adjournment until the 19th of June, that Mr. Sandford might then sum up, which was granted, although the defendant objected, and insisted that Mr. Sandford should sum up on the 14th, or not be heard. On the 19th of June, Mr. Sandford attended and summed up, at length, for Mr. Allen, "against the remonstrances of the defendant." When the testimony was concluded, the defendant again moved to dismiss the complaint, on two grounds: 1st. "that the claim had been assigned to Brown, and the title to it, and to the award, was in him, and the suit should have been in his name;" 2d. "that the arbitrators, in hearing counsel after the time limited by the submission, and especially in hearing the counsel for Allen, on the 19th of June, 1850, notwithstanding the agreement to the contrary, and against the objections of the defendant, exceeded their authority, and were subjected to such influences that the award is void."

The point, that the complaint does not state facts sufficient to constitute a cause of action, was not taken at the trial, nor is it contained in the printed points submitted to the Court, on the argument of the appeal. The substance of the points, on either side, upon the question of the arbitrators having exceeded their authority, is stated in the opinion of the Court.

S. Sanxay, for plaintiff.

Wm. Curtis Noyes, for defendant.

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BY THE COURT. DUER, Ch. J.—There are two objections to the recovery of the plaintiff in this case, to which no satisfactory answer has been, nor, as seems to us, can be given. If the first objection is well founded, no action whatever is maintainable upon the answer; if the second, the action, if maintainable at all, is not so upon the pleadings, as they now stand.

The first objection denies entirely the validity of the award, upon the ground, that it was made after the expiration of the time limited by the agreement of the parties; and, if the allegation is sustained by the proof, it is needless to cite authorities to show that the objection is fatal. The award is a nullity, if the powers of the arbitrators had ceased when it was made.

By the terms of the original submission, the award was to be made on or before the first day of January, 1848; but this time, by successive and valid extensions, was enlarged to the first Monday of June, 1850, and, on the first day of June, in that year, the parties, under their hands and seals, made the following agreement:—

"The time for the parties to close their arguments on the arbitration, under the annexed bond, is hereby extended to the 12th day of June inst., and the time for the arbitrators to make and deliver their award, on the said bond, is hereby extended to the first Monday of July next."

At a meeting of the arbitrators, on the 7th of June, the parties agreed, in the presence of the arbitrators, that both parties should close their arguments on the 14th of that month; and it is not denied, that the agreement which I have read must be construed in the same manner as if this last day had been originally inserted therein. On the 14th of June, the counsel for the defendant attended, and summed up the case on his behalf; but no counsel attended on behalf of Allen, the other party to the submission. The arbitrators, however, at his request, adjourned to the 19th June, for the purpose of hearing his counsel on that day, and they granted the adjournment, not only without the consent, but against the wishes and remonstances of the defendant. They, accordingly, met again on the 19th, when the counsel for Allen attended, and, against the continued remonstrances of the defendant, was fully heard on behalf of his client, and closed the arguments. Such are the facts, as distinctly proved by one of the ar-

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bitrators, and uncontradicted by any other testimony ; and that they amount to a direct and absolute breach of the agreement of the 1st of June, it is impossible to deny.

The question, therefore, is, whether, by this breach, the consent, which the defendant then gave to an extension of the time for making the award, was not rendered inoperative and void ; for, if so, an authority, which existed only by his consent, was of necessity terminated. If the arbitrators, by disregarding the terms of this agreement, annulled his consent, they, by the same act, however unintentionally, annulled their own powers.

The arbitrators had no authority to act at all after the first of June, except that which they derived from the written agreement of the parties on that day ; but, to determine the extent of their authority, that agreement, it is evident, must be construed as a whole, and we have, assuredly, no right to reject any part of it to which a reasonable and consistent interpretation can be given.

Unless, however, the clause that fixed the day for closing the arguments may be stricken out entirely, as superfluous or unmeaning, we are bound to give it a construction that shall render it effectual, and we apprehend that it can only be made so by the construction that I shall state, and that, as a Court, we shall adopt.

When the defendant agreed, that the time for making the award should be extended to the first Monday of July, he had a perfect right to annex such terms and conditions to his consent as he might deem expedient. He had a right to say, that he agreed to the extension only upon the condition, that the arguments should be closed on the appointed day ; and if such is the true construction and import of his agreement, we cannot doubt that the arbitrators, in violating this condition, exceeded their powers, and, by so doing, rendered void their subsequent acts. We think that such was not only the true, but necessary import of this agreement ; and we think so, for the conclusive reason, that it is only by this construction that the clause limiting the time for closing the arguments could be rendered operative at all. It created no obligation, either on the parties or on the arbitrators, if either party, contrary to the wishes of the other, but with the consent and aid of the arbitrators, could violate it with impunity ; and it was violated with impunity, unless the effect of its breach was to vitiate and annul the award that followed. The clause

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had no operation at all, unless it created a restriction on the powers of the arbitrators, which the law bound them to observe.

It was, indeed, strenuously contended, by the counsel for the plaintiff, that the agreement of the parties that the arguments should be closed on a particular day, was not binding upon the arbitrators at all, and that it rested wholly in their discretion to hear the counsel of the parties at any time within the period limited for making the award. Indeed, the learned counsel went still further, and insisted that, after the counsel for the defendant had been heard, the refusal of the arbitrators to hear the counsel for Allen on a subsequent day would have been, not merely an abuse of discretion, but a plain violation of duty. That so far from being controlled in the exercise of their powers by the agreement of the 1st of June—explicit and unambiguous as its terms certainly were—they would have been guilty of error and injustice, had they failed to overrule and disregard it. These assertions of the counsel struck us as somewhat novel when they were advanced, nor have we since been able to discover that they have any support from reason or authority. On the contrary, we are satisfied, that, unless we mean to overturn the whole law of arbitration, as it has hitherto been understood, we must hold them to be groundless.

Where a controversy is submitted to the decision of arbitrators, the parties have an undoubted right to restrict the exercise of the powers which they create and intrust, within any limits they may choose to impose, and to prescribe any rules for the government of the arbitrators, in the discharge of their duties, that they may deem it wise to adopt. They have exactly the same right to limit the period within which evidence shall be received or counsel be heard, as to limit the period for making an award; and, as we understand the law, every restriction so imposed, and every rule so prescribed, is, in its nature, a condition, and operates as a limitation of the authority of the arbitrators, which, if they disregard or exceed, puts an end to their powers, and renders void their subsequent proceedings.

Whether such a limitation be imposed by the original submission, or by a subsequent agreement, extending the time for making an award, we hold to be quite immaterial. In both cases, the agreement of the parties is equally the source of the authority of

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the arbitrators, and in both, the terms of the agreement equally define the limits of that authority, and prescribe the mode of its exercise. But for the agreement of submission, the arbitrators could not have acted at all; but for the agreement of extension, they could not have continued to act.

The rules that I have now stated belong to that settled and familiar law, that is to be found in every treatise or text-book on the subject of arbitrations, and it would, therefore, be a waste of time to exemplify them by a reference to adjudged cases. I shall content myself by referring to a single case, which I select from the close analogy that it bears to the present. In the case of *Walker v. Frobisher*, (6 Vesey, 70,) evidence was received by a sole arbitrator, after a notice in which the parties had acquiesced, and had thereby agreed to be binding, that no more would be received, and, for this excess of his authority, his award was set aside; and in the well-known case of *Van Cortlandt v. Underhill*, (19 John. R. 411,) Ch. J. Spencer, in delivering the judgment of the Court of Errors, cites the decision with marked approbation.

It seems to us that this was a much stronger case for sustaining an award, if an excess of authority could be overlooked, than that which is before us. The agreement of the parties was neither as solemn in its form, nor as explicit in its terms, and the hazard of injustice, from the exclusion of evidence, was far greater than any that could have resulted from a refusal to hear the arguments of counsel.

It is said, that the defendant was not, and could not have been injured by the consent of the arbitrators to hear the counsel of the adverse party, and that the mistake, if mistake there was, ought, therefore, to be passed over as immaterial; but this is an argument to which, we are satisfied, we have no right to listen. The agreement for closing the arguments of counsel, was regarded by the defendant as material; and he insisted, that the arbitrators, therefore, violated a restriction which they were bound to observe. And these, alone, are the facts that we are at liberty to consider. Into the materiality of the restriction, and the sufficiency of the reasons that led the parties to impose it, we cannot inquire. The expression of their will was the law that the arbitrators were bound to follow.

In the case of *Walker v. Frobisher*, to which I have before re-

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ferred, the arbitrator swore, that the evidence which he improperly received was immaterial, and had no influence upon his decision, and, consequently, that its reception worked no prejudice to the party against whom it was taken; but the brief reply of Lord Eldon was, that, although the award might be perfectly just, upon principle, it could not be supported. We make, in substance, the same reply. The arguments, which the arbitrators improperly consented to hear, may have had no influence upon their decision, and the award they made, as between the parties, may have been perfectly just, but they had no right to listen to the argument, and, upon principle, the award cannot stand.

As I have already said, the material facts, showing an excess of authority on the part of the arbitrators, was proved by one of their number, and it was objected, upon the trial, that he was an incompetent witness. The objection was renewed upon the argument before us, and several cases were cited in its support, but we think that the cases were inapplicable, and the objection untenable. It may be true, that before the Code—and we will not say, that such is not still the law—an arbitrator was an incompetent witness to prove the misconduct of himself or his associates: he was not permitted to impeach an award, by proving facts that occurred in the intercourse of the arbitrators with each other, or in their secret deliberations; but we are not aware, and cannot believe that it has ever been held or supposed, that an arbitrator might not be admitted to testify to facts that occurred upon a public hearing, and in the presence of the parties, and to the decisions that were then openly made by himself and his associates; and it appears to us, that to exclude his testimony in relation to such facts, would be quite as unreasonable as to hold that a Judge may not sign a bill of exceptions containing the proceedings and his own decisions upon a trial.

In the case of *Van Corlandt v. Underhill*, which is one of those that were cited, all the arbitrators appear to have been examined as witnesses, and apparently without objection; and in *Newland v. Douglas*, (2 John. R. 62,) another of those cases, the ground of the decision was, not that the witness was incompetent, but that, in a court of law, the proof offered was inadmissible.

The second objection to the recovery of the plaintiff is, that the complaint does not contain facts sufficient to constitute a cause

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of action. An objection, which the Code declares is not waived, though not taken by demurrer or answer, (Code, §§ 144, 148,) and, therefore, as we construe the provision, may be taken upon an appeal to the General Term, even when it appears that it was not taken upon the trial.

The award, upon which the action is founded, concludes with an order, that upon the payment by the defendant to Allen of the sum of \$9402.⁷⁶, the parties shall execute and deliver, each to the other, a general release of all debts, demands, etc., etc., from the beginning of the world to the 26th of October, 1849, the date of the submission. The complaint, however, contains no averment, that, when Allen demanded from the defendant the payment of the sum awarded, he delivered and tendered to him a general release in the form prescribed, or any release whatever. The only averment is, that Allen has executed such a release, which is ready to be delivered, when the sum awarded shall be paid; and such an averment, when a delivery or tender before the commencement of an action is necessary, is plainly insufficient. In our opinion, an averment in the complaint of an actual delivery or tender, or offer to deliver, before the commencement of a suit, of a general release, was material and necessary, for the conclusive reason, that until such delivery or tender, no action upon the award could be rightfully commenced, or legally maintained.

In relation to contracts, there seems to be no exception from the rule, that when concurrent acts are to be performed by the parties, their promises or covenants for such performance must be construed as conditional and dependent, so that neither can maintain an action against the other for an alleged breach, without averring and proving an actual performance, or tender of performance, on his own part, before the commencement of the suit, and the rule applies, even where the performance of a stipulated act by one of the parties, such as a payment of a sum of money, is stated in terms to be a condition precedent to a performance by the other, as when a deed is covenanted to be delivered upon the payment of a certain sum, as its consideration. The tender of a deed is just as necessary to be averred and proved, when an action is brought for the recovery of the price, as the tender of the money when the action is brought to compel a delivery of the deed. In short, the rule is applicable in all cases, where the acts

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are to be performed at the same time, no matter which is stated to be first in the order of performance.

The leading cases, on this branch of the law, are all collected and reviewed in the elaborate judgment delivered by Mr. J. Edwards, in the case of *Lester v. Jewett*, in the Court of Appeals, (1 Kernan, 453,) and it is needless to refer to any other authority, as evidence that the rules now established are such as I have stated.

In our opinion, the doctrine, thus established, is just as applicable to concurrent acts directed to be performed by an award, as to similar acts agreed to be performed by a contract; it is just as applicable to the delivery of a release, upon the payment of the sum awarded, as to the delivery of a deed, upon the payment of the consideration-money. The true and sole ground of the rule, in its application to contracts, is the probable intention of the parties, and its ground, in its application to an award, is the similar intention of the arbitrators. An intention by which the parties have agreed to be bound.

It is true, that, before the Code, a plaintiff, in declaring upon an award, was only bound to state those parts of it that were in his own favor, and, by a singular exception from the general rules of pleading, was not bound to aver the performance of a condition precedent. (2 Wm. Saunders, 62, note 5,) *McKinstry v. Solomons* (2 John R. 62). But the Code has abolished an exception, which, even under the old system, was anomalous. A plaintiff, as we have frequently decided, is now bound to aver, in his complaint, every fact that he is bound to prove upon the trial, as part of his own case, and in order to maintain his action; and we have so held, and must continue to hold, that the facts, thus necessary to be proved, are those that, in judgment of law, constitute his cause of action. *Garvey v. Fowler*, (4 Sandf. S. C. R. 667;) *Mann v. Morewood*, (5 Sandf. S. C. R. 567;) *Catlin v. Gunter* (1 Duer, 266).

Had it been proved on the trial, without objection, that a proper release was, in fact, tendered before the commencement of the action, the want, in the complaint, of an averment of the tender, might have been disregarded, or supplied by an amendment; but as no such proof was then given, and the objection has now been properly raised by the defendant, we cannot overrule it. On the contrary, as we deem it to be unanswerable, we must give effect to it, by rendering the same judgment that must have been given

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had the same objection been raised by a demurrer. We must thus dismiss the complaint, with costs.

Judgment accordingly.

**GEO. E. SHERWOOD, Plaintiff and Appellant, v. JAS. V. SEAMAN,
Respondent.**

A landlord, in the absence of an express covenant, is under no obligation to repair, or to do any act to protect his tenant from the consequences of the lawful acts of the owner of adjoining premises, in excavating them to such depth as would endanger the stability of the demised premises.

Chap. 6 of the Laws of 1855, has not altered the duties and liabilities of a landlord to his tenant.

Mere knowledge of the landlord, that his tenant is willing that he should give the license, provided for by that statute, does not create a duty to give it, nor subject the landlord to an action, because he did not give it.

To subject the person excavating to the expense of protecting the adjoining building, he must "be afforded the necessary license to enter on the adjoining land." This must be explicit, and sufficient to protect him in doing the acts to be done, to perform the duty the statute creates; and it would seem, that it should be given by all persons who would be injuriously affected by such acts.

(Before Bosworth and Hoffman, J. J.)

Heard, November 9th; and decided, November 28th, 1857.

THIS action comes before the General Term, on an appeal by the plaintiff from a judgment rendered by Mr. Justice Duer, on the 31st of January, 1857, in favor of the defendant, on a demurrer interposed by him to the plaintiff's complaint. The complaint is, in substance, as follows, viz:—

I. The complaint states that the defendant had leased to plaintiff the basement room and a back building of lot No. 252 Broadway, for a saloon and restaurant, for three years, from the 1st of May, 1856, at the annual rent of \$1100, payable monthly (containing a copy of the contract of letting).

II. That the plaintiff, at the same time, executed and delivered to the defendant a counter agreement, binding himself to pay the rent.

III. That the plaintiff, on the 1st day of May, 1856, entered upon said term, under the lease, and paid the rent to 1st June, 1856.

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IV. That Grosvenor, the owner of lot No. 251, adjoining the demised premises, duly notified the defendant that he intended to excavate the soil of his lot ten feet below the curb, to lay the foundation of a building he intended to erect thereon.

V. That defendant neglected and refused to grant the license, under the statute, to Grosvenor, to enter lot No. 252, in order to compel him, at his own expense, to preserve the southerly walls of the buildings on No. 252, and support the same by a proper foundation.

VI. That the plaintiff had no possession or control of the rest and residue of the buildings, and no right to occupy the same.

VII. That the defendant was the owner of the title to the same, and had the possession and control thereof.

VIII. That defendant well knew that plaintiff was willing that defendant should grant such license to Grosvenor to enter lot No. 252.

IX. That, in consequence of such excavations on lot 251, the buildings on lot 252 fell, and crushed and destroyed all the plaintiff's furniture, fixtures, etc., to the value of at least \$4000, and rendered the demised premises unfit to occupy as a saloon or restaurant, and wholly worthless.

X. That defendant was bound to support and sustain said buildings, or grant a license to Grosvenor to do it.

XI. That plaintiff's property on the demised premises, and his business, were wholly destroyed and broken up, and the lease rendered valueless, and he evicted, etc., from the premises, to plaintiff's great damage, for which he demands judgment for \$10,000.

The lease from the defendant to the plaintiff was set out, in the complaint, in full, and reads thus, viz.:—

"I agree to let, to Geo. E. Sherwood, the premises now occupied by him, at No. 252 Broadway, for a saloon and restaurant, for three years from May 1st, 1856, at yearly rent of eleven hundred dollars per year, payable monthly; he, the said Sherwood, agreeing to vacate the said premises one year previous to the expiration of said term, if Charles S. Francis vacates the upper part of said premises, said Sherwood to do all necessary repairs at his own expense.

"J. V. SEAMAN."

"New York, January 23d, 1856.

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The complaint also contains these allegations, viz. :—

"And the plaintiff further shows, that the said Grosvenor carried on and conducted said excavations on his said lot, so as to relieve and keep himself harmless of any trespass on the plaintiff's rights or other liability for the injury, loss and damage sustained by him in consequence of the fall of said buildings occupied by him as aforesaid, on said lot No. 252 Broadway."

The defendant demurred to the complaint, specifying, among other grounds of objection, that it does not state facts sufficient to constitute a cause of action.

Judgment having been given for the defendant, the plaintiff appeals from it to the General Term.

H. Z. Hayner, for plaintiff and appellant, insisted, among other grounds, in support of the appeal, that it is the policy of the law that the landlord shall not be encouraged to do, or suffer any thing to be done, which he can legally prevent, by which his tenant shall be injured or his possession disturbed, and cited *Dyett v. Pendleton*, (8 Cowen R. 727;) *Edwards v. Hethrington*, (7 Dowl. & Ryl. R. 117;) *Ogilvie v. Hull*, (5 Hill R. 52;) *Cohen v. Dupont*, (1 Sandford R. 260;) *Christopher v. Austin*, (1 Kernan, 216;) *Gilhooley v. Washington* (4 Comst. 217).

The defendant, under the Act, had the power to prevent his premises being thus used by any one. (Laws N. Y., 1855, pp. 11, 12, § 1.)

Having the power in law to prevent Grosvenor from inflicting these injuries upon the plaintiff, through the use of defendant's premises, he is responsible for such injuries. *Gilhooley v. Washington* (4 Comst. 217).

In refusing to grant the license in question, and thus suffering Grosvenor to excavate, without preserving the walls of the buildings on lot No. 252, the defendant wilfully caused the destruction of the premises he demised to the plaintiff, and which, in legal effect, is a tortious eviction of the tenant by his landlord.

Had the Act respecting excavations never been passed, it would have been the legal duty of the defendant to use the necessary precautions to sustain and preserve from injury the walls of the buildings liable to be injured or endangered by excavations on the adjoining lot, inasmuch as a small portion thereof, only, were

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demised to the plaintiff, and the defendant being the owner of the whole, and the landlord of the part demised.

R. E. Mount, Jr., for respondent.

BY THE COURT. BOSWORTH, J.—There is no express covenant or promise in the lease, from the defendant to the plaintiff, that the former will make repairs, or do any act to preserve the demised premises in a condition fit for habitation, or for the prosecution of the business for which they were demised. On the contrary, the written contract states, that the plaintiff was "to do all necessary repairs at his own expense."

Howard v. Doolittle, (3 Duer, 464,) is in point, and determines, that the landlord, in the absence of an express covenant, is under no obligation to repair, or to do any act to protect his tenant from the consequences of the lawful acts of the owner of adjoining lots, in excavating them to such depth as would endanger the stability of the demised premises. That decision must control our own on that point. In the opinion of the Court, in *Howard v. Doolittle*, the leading authorities are examined, and establish, as we think, the conclusions at which the Court arrived. See, also, *Keates v. Cadogan* (2 Eng. L. & Eq. R. 318).

Unless Chap. 6 of the Laws of 1855 (p. 11) has altered the duties and liabilities of a landlord to his tenant, there is no cause of action stated in the complaint. That Act makes it practicable to subject a person, excavating a lot in the City of New York to the depth of more than ten feet below the curb, to the expense of preserving from injury a contiguous wall on an adjoining lot, during the excavations, and of supporting the same by a proper foundation, so that it shall remain as stable as before such excavations were commenced.

To subject the person excavating to such expense, he must "be afforded the necessary license to enter on the adjoining land."

Such license must be tendered, and must be express, and authorize such acts to be done as may be necessary to enable the person, to whom it may be given, to perform the duty which the statute, in such a contingency, creates.

When given, it must be given by those who may be injuriously affected, for the time being, by the acts necessary to preserve from

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injury the wall on the adjoining lot, and to support it by a proper foundation.

A license from the landlord will not protect him from an action by the tenant for interfering with the possession of the latter. A license from both landlord and tenant may be necessary to protect the person proposing to excavate, and, if so, would be necessary to subject him to the liability declared by this statute.

But we think it a sufficient answer, to the arguments of the plaintiff, based on this statute, to say that prior to the statute the landlord was under no obligation, as between himself and his tenant, to do any thing to preserve the demised premises from the consequences of such acts.

That statute does not create, and was not designed to create any such obligation. Its whole object was, to enable those who might desire to protect an adjoining wall from injury, and who, but for the Act, must have preserved it at their own expense, to cast upon a person excavating the expense and responsibility of preserving it from injury until the excavations are completed, and of continuing its stability, as firm as he found it when the excavations were commenced.

It does not make it compulsory upon any one, who has a building on the lot adjoining the lot to be excavated, to protect his building, or subject him to the expense and necessity of preserving it from injury.

This is not a case, therefore, in which the landlord has done any affirmative act, or authorized an act to be done by any other person, which makes the demised premises less beneficial, or wholly useless to the tenant.

All the acts done by Grosvenor, instead of being done by virtue of any permission of the landlord, express or implied, were performed in his own right, as owner of the lot excavated.

The consent of the defendant to these acts was not essential to justify them, and it was not asked. The defendant could not have prevented him from doing them, and an express notice forbidding him to do them, would not have subjected Mr. Grosvenor to any liability to any one.

The complaint avers, that "the said Grosvenor carried on and conducted said excavations on his said lot, so as to relieve and keep himself harmless of any trespass on the plaintiff's

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rights or other liability for the injury, loss and damage sustained by him in consequence of the fall of said buildings, occupied by him as aforesaid, on said lot, No. 252 Broadway."

To sustain this action, it is necessary to hold, that although the landlord is under no obligation to be at any expense, or to do any act to sustain the demised premises, and preserve them from injury, yet he is bound, by force of the relation of landlord and tenant, to give such a license, in a case like the present, as will make it the duty of a person about to excavate an adjoining lot, to preserve from injury the wall of the demised premises, while the excavations are progressing, and leave it, when they are completed, as firmly supported as it was when they were commenced.

This liability, if it exists, grows out of the statute and the fact, that the landlord knew the tenant was willing that such license should be afforded.

This statute, in our view of it, does not alter the duty of landlords, to their tenants, so as to require the former to interfere in any manner with the lawful or unlawful acts of third persons, for the protection of their tenants against consequences, which they have not undertaken to mitigate or prevent.

The landlord is not liable to indemnify the tenant against results, which he has not promised, either expressly or by implication, should not occur.

The judgment must be affirmed.

HIGGINS, Plaintiff and Appellant, v. N. Y. & HARLEM R. R. CO.

When a collision occurs between a train of cars, in which the plaintiff was at the time a passenger, and another train, and the plaintiff was at the time standing on the platform of a car, and was injured, he is not entitled to an instruction to the jury, "that, if the conductor of the train, on which he was, knew of his being on the platform, and did not object, the consent of the company may be presumed, and the company would be liable," unless, upon the evidence, it is free from doubt, that he was injured by the negligence of such company, without any fault on his part; and if the notices, authorized by § 46 of chap. 140 of the Laws of 1850, were posted up at the time inside of the passenger cars then on the train, then also, that the company at the time did not furnish room, inside of its passenger cars, sufficient for the proper accommodation of the passengers.

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If such notices were duly posted at the time, and sufficient room was furnished, inside of the cars, for the proper accommodation of the passengers, the mere fact, that the conductor did not object to the plaintiff's standing on the platform, would not justify the presumption, that the company assented to waive a protection given to them by statute, which these notices expressly declared they should claim, and on which, they informed all passengers, the company would insist.

(Before Bosworth and Hoffman, J. J.)

Heard, November 9th, and decided, November 28th, 1857.

THIS action comes before the Court at General Term, on an appeal by the plaintiff from a judgment in favor of the defendants. It was brought to recover damages sustained by the plaintiff, while a passenger on the cars of the defendants, from a collision between the train on which he was riding and a freight train belonging to the N. Y. & New Haven Railroad Company. It was tried in June, 1856, before Judge Woodruff and a jury.

The collision was caused by the cars of the defendants running against a freight train of the New Haven Company, which was due in New York City many hours before the collision, which occurred near 58th street, while both trains were going into, or towards the City of New York. It was admitted, on the trial, that the plaintiff, at the time of the accident, was standing on the platform of the car on which he was riding. Evidence was given, on the part of the plaintiff, with a view to show, that the collision was caused by the negligence of the defendants; and by the latter, to show, that it was caused by the negligence of the N. Y. & New Haven Railroad Company, without negligence on their own part; also, that notices were posted up, inside of the passenger cars of the train in which the plaintiff was, conforming to the statute on that subject, and that there was sufficient sitting accommodations inside of the cars for all of the passengers.

When the evidence was closed, the counsel of both parties addressed the jury. The counsel for the plaintiff requested the Judge to charge, "That, if the conductor of the Harlem passenger train knew of the plaintiff's being on the platform, and did not object, the consent of the company may be presumed, and the company would be liable."

"The Court refused to charge, on the subject, otherwise than is hereinafter stated, and plaintiff's counsel then and there excepted."

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The portion of the charge relating to the subject-matter of such request, was as follows, viz.:—"The statute of 1850, relative to the standing on platforms, is relied on by the defendants; by this you have to be governed unqualifiedly. (His Honor then read the statute of 1850.) It is reasonable and just, and if this applies to the plaintiff, and if the defendants have shown themselves within its provision—that is, if the defendants had complied with all the conditions of the statute, and the plaintiff was on the platform unnecessarily, and in violation of the notices put up in the cars—he cannot recover. The plaintiff, however, was not obliged to go over platforms, etc., when the cars are in motion and incur danger, to find a seat. If he wished to find a seat, the conductor's duty is to show him one. As to proof of the notices required by the statute which I have read to you, it is the duty of defendants to satisfy you that the required notices were up, inside the cars, that morning. If proved to you, that such notices were habitually kept up by the defendants inside, at each end, and alongside of their passenger-cars running over their road in the train in which the plaintiff was, and were regularly there, so that passengers, passing daily over the road, saw them, and that they had been so regularly for a series of years, and down to the present time, this would raise the presumption, that they were up that morning, if nothing to the contrary appeared; also, as to there being room inside the cars sufficient for the passengers, it is proper to say, that the statute means that the company shall furnish room inside its cars, sufficient for the proper accommodation of the passengers, and this without subjecting the passenger to the necessity of exposing himself to danger in finding such accommodation inside; and the company ought to allow the passengers, time and opportunity to find seats, if they are provided, without hazard of danger in the search, otherwise they cannot be said to furnish accommodation inside the cars, within the meaning of the statute."

The jury found a verdict for the defendants. The plaintiff moved for a new trial, on the ground that the verdict was against evidence. From the order denying that motion, and from the judgment entered on the verdict, the present appeal is taken.

George G. Bellows, for the plaintiff and appellant, insisted, that the plaintiff, being on the platform of a car in the train of defend-

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ants, even admitting that notices in pursuance of an Act of 1850 were posted up in cars composing that train, and that there were vacant seats, does not bar a recovery, as plaintiff was there by the assent of the conductor having the train in charge; and no act on the part of the plaintiff tended to produce the injury he sustained, or did in any way contribute thereto; and the plaintiff would be entitled to recover, if the injury resulted from the want of that care and caution which defendants were bound to exercise. The Justice, before whom the cause was tried, should have charged as requested. (*Carroll v. N. H. R. R. Co.*, 1 Duer's Reports, 571.)

There is no testimony, on the part of the defendants, to show that the notices, required by the Act of 1850, were posted up in the train of defendants on the morning of the accident; and under the construction of the statute, as claimed by defendants' counsel, defendants were bound to show, that the statute had been strictly complied with, in every respect, at the time of the collision, and that there was a regulation of the company, to the effect, that notices should be posted up prohibiting persons from standing on the platforms. (See Session Laws of 1850, p. 234, § 46; *Sprague v. Birdsall*, 2 Cowen, 419; *Rathburn v. Acker*, 18 Barb. S. C. R. 234.)

Charles W. Sandford, for respondents.

BY THE COURT. BOSWORTH, J.—This action comes before the Court, on an appeal by the plaintiff from the judgment, and from an order denying a motion, made on a case, for a new trial.

No exception was taken to the admission or rejection of evidence, or to the charge as made. The plaintiff requested a particular instruction to be given, and the Judge refused to charge otherwise, on the subject, than he did charge, and the plaintiff excepted. The Judge was requested to charge "That if the Conductor of the Harlem train knew of the plaintiff's being on the platform, and did not object, the consent of the company may be presumed, and the company would be liable."

The plaintiff was not entitled to this absolute instruction, unless the evidence established, beyond controversy, that he was injured by the negligence of the defendants, without any fault on

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his part contributing to the injury ; and also, if the notices authorized by § 46 of Chap 140 of the Laws of 1850 (p. 234) were posted up at the time, inside of the passenger cars then in the train, that the company at the time did not furnish room inside of its passenger cars sufficient for the proper accommodation of the passengers.

If such notices, being part of the printed regulations of the company, were duly posted at the time, and there was at the time sufficient room inside of the passenger cars for the proper accommodation of the passengers, the mere fact, that the conductor did not object to the plaintiff standing on the platform, would not justify the presumption that the company assented to waive a protection given to them by the statute, which these notices expressly declared they should claim, and on which they informed all passengers the company would insist.

Whether the notices were duly posted at the time was submitted to the jury, and there was sufficient evidence of the fact to make the submission of that question proper.

The question was also submitted whether, at the time, sufficient room was furnished, inside of the cars, for the proper accommodation of the passengers. On that point, the jury were instructed that the company could not be said to have furnished sufficient accommodation inside the cars, within the meaning of the statute, unless they allowed the passengers time and opportunity to find seats, without hazard of danger, in the search, by passing from platform to platform while the cars were in motion.

We think this was a submission of this question, in a manner of which the plaintiff cannot justly complain. The plaintiff being a commuter, and a daily passenger in this train, we cannot say the jury were unauthorized in finding, that the plaintiff knew that, at the place where he entered the cars, the only vacant seats would be found in the rear car or cars, and that other passengers, and the plaintiff, as well as others, habitually crowded upon the forward cars, although they contained no unoccupied seats, for the mere purpose of gaining a little time, by being in the cars to be first started, after horse power was substituted for that of steam.

We do not feel at liberty to say, that a verdict, finding that sufficient room was furnished at the time inside of the cars for

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the proper accommodation of the passengers, is so clearly against evidence as to justify us in granting a new trial for that cause.

We think the evidence given was such, as made it the duty of the Judge to submit the question, whether the injury was caused without any negligence of the defendants, and by the negligence of the New Haven Company. The rules, stated to the jury as their guide with reference to the effect of the facts they might find, were not excepted to, and were not prejudicial to the plaintiff.

No objection was made to submitting to the jury either of the questions of fact which they were left to determine, or to the charge, in any of its details, except such as may be implied by the specific instruction requested, and the exception to the refusal of the Judge to charge in the terms required.

We do not feel at liberty to interfere with the verdict, on the ground that it is not warranted by the evidence. The exception taken being untenable, the judgment and order appealed from must be affirmed with costs.*

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A notice to the endorser of a note, dated on the day such note matures, stating, that a note made by the actual maker thereof, naming him, and the date of the note and its amount, and that it is endorsed by the person to whom such notice is directed; and also stating, that such "note was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof," is sufficient to charge such endorser, unless it is made to appear, that he was the endorser of other notes, then outstanding, made by the same maker, of the same date, and for the same amount.

When, in such a case, a notice, which is sufficient in the absence of proof of any such extrinsic facts, is, by such proof, rendered defective, by reason of not being sufficiently full in its description of identifying particulars, the plaintiff may prove other extrinsic facts, existing and known to such endorser at the time of his receipt of the notice; and if, on construing the notice in the light of all such extrinsic facts, there can be no reasonable doubt, that the endorser knew

* See *Colegrove v. Harlem and New Haven R. R. Co.*, 6 Dunn, 382. That case and this are brought to recover damages sustained by the same collision.

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that the notice related to the note maturing on the day of the date of such notice, it will be held sufficient.

If there be a conflict of evidence, as to the existence of the alleged extrinsic facts, or as to the defendant's knowledge of them, the questions of fact must be determined by the jury.

When there is no conflict of evidence, as to either of those facts, the sufficiency of the notice is to be determined by the Court.

A general verdict, ordered for the plaintiff, will not be set aside, merely because the Judge, at the trial, submitted to the jury special questions, and which they answered affirmatively, when, upon the evidence given, the Judge might have ruled, with propriety, that the propositions, which the answers of the jury to such questions affirmed, had been satisfactorily established, and entitled the plaintiff to a verdict.

(Before Bosworth and Hoffman, J. J.)

Heard, November 11th; decided, November 28th, 1857.

THIS action comes before the General Term, on a verdict for the plaintiff, taken, subject to the opinion of the Court on questions of law directed to be heard at the General Term, in the first instance. It is brought by Edward Cook, as plaintiff and endorsee, against Elisha C. Litchfield, as defendant, and as payee and endorser of three promissory notes, each of the same date and amount, and each being dated, "Detroit, April 2d, 1849," each made by "J. L. Carew," and each payable, with interest, to the order of the defendant, "at the Bank of New York, in the City of New York," one at ten, one at eleven, and one at twelve months from its date. The controversy relates, chiefly, to the sufficiency of the notices, served on the defendant, to charge him as endorser. The action was tried in December, 1856, before Ch. Justice Oakley and a jury.

The plaintiff's counsel, after opening the case to the jury, put in evidence the three promissory notes, mentioned in the complaint, being as follows:—

"DETROIT, April 2d, 1849.

"\$740.

"Ten months after date, I promise to pay, to the order of E. C. Litchfield, Esq., at the Bank of New York in the City of New York, seven hundred and forty dollars, value received, with interest.

J. L. CAREW."

(Endorsed) "E. C. LITCHFIELD,
G. W. RYCKMAN."

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“DETROIT, April 2d, 1849.

“\$740.

“Eleven months after date, I promise to pay, to the order of E. C. Litchfield, Esq., at the Bank of New York in the City of New York, seven hundred and forty dollars, value received, with interest.

J. L. CAREW.”

(Endorsed) “E. C. LITCHFIELD,
G. W. RYCKMAN.”

“DETROIT, April 2d, 1849.

“\$740.

“Twelve months after date, I promise to pay, to the order of E. C. Litchfield, Esq., at the Bank of New York in the City of New York, seven hundred and forty dollars, value received, with interest.

J. L. CAREW.”

(Endorsed) “E. C. LITCHFIELD,
G. W. RYCKMAN.”

It was also stated and admitted, that there was a fourth note, similar, except as to time of payment, which was still held by the plaintiff, being in litigation in another suit between the same parties, such fourth note being as follows:—

“DETROIT, April 2d, 1849.

“\$740.

“Nine months after date, I promise to pay, to the order of E. C. Litchfield, Esq., at the Bank of New York in the City of New York, seven hundred and forty dollars, value received, with interest.

J. L. CAREW.”

(Endorsed) “E. C. LITCHFIELD,
G. W. RYCKMAN.”

The plaintiff proved, that each of the said four notes, on the day when it became payable, (being severally the 5th day of January, February, March and April, 1850,) was presented at the Bank of New York in the City of New York, by a notary public, and payment thereof demanded, of the teller, which he refused; and that, on the following morning, (except the first case, when the following day was Sunday, and then, on the Monday morning next

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afterwards,) a notice, signed by the said notary public, was deposited in the New York post-office, addressed to the defendant, at Detroit, Michigan; that only one such notice, to the defendant, was sent for each note; that said notices consisted of printed blanks, filled up in manuscript, and there is a blank space of several lines, in the printed blanks, between the words "dated" and "endorsed;" and that the notices produced, by the defendant's counsel, and in evidence on the trial, are the same which were so sent, such produced notices being as follows:—

"NEW YORK, Jan. 5th, 1850.

"\$740 and interest.

"Please to take notice, that a promissory note, made by J. L. Carew, for \$740, with interest, dated April 2d, 1849, endorsed by you, was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof.

"Your obedient servant, JOHN T. IRVING,
"Notary Public, Mechanics' Bank, Attorney and Counsellor,
No. 7 Nassau street."

"Mr. E. C. LITCHFIELD, Detroit, Mich."

(Postmark) "New York, 7th January, 10 cents.

(Superscription) "Mr. E. C. Litchfield, Detroit, Michigan."

"\$48 60 interest.

740 00

\$783 60" "NEW YORK, February 5th, 1850.

"Please to take notice, that a promissory note, made by J. L. Carew, for \$740, with interest, dated Detroit, April 2d, 1849, endorsed by you, was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof.

"Your obedient servant, JOHN T. IRVING,
"Notary Public, Mechanics' Bank, Attorney and Counsellor,
No. 7 Nassau street."

"E. C. LITCHFIELD, Esq., Detroit, Michigan."

(Postmark) "New York, 6th February, 10 cents."

(Superscription) "Mr. E. C. Litchfield, Detroit, Michigan."

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"\$47.91 interest.

740.00

\$787.91

"NEW YORK, March 5th, 1850.

"Please to take notice, that a promissory note, made by J. L. Carew, for \$740 and interest, dated Detroit, April 2d, 1849, and endorsed by you, was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof.

"Your obedient servant, JOHN T. IRVING,
"Notary Public, Mechanics' Bank, Attorney and Counsellor,
No. 7 Nassau street."

"E. C. LITCHFIELD, Esq."

(Postmark) "New York, 6th March, 10 cents."

(Superscription) "Mr. E. C. Litchfield, Detroit, Michigan."

"\$740 and interest.

NEW YORK, April 5th, 1850.

"Please to take notice, that a promissory note, made by J. L. Carew, for \$740 and interest, dated April 2d, 1849, endorsed by you, was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof.

"Your obedient servant, JOHN T. IRVING,
"Notary Public, Mechanics' Bank, Attorney and Counsellor,
No. 7 Nassau street."

"Mr. E. C. LITCHFIELD, Detroit."

(Postmark) "New York, 6th April, 10 cents."

(Superscription) "Mr. E. C. Litchfield, Detroit, Michigan."

It was admitted by the counsel for both parties, that the defendant lived in Detroit, Michigan, at the date and endorsing of the notes, and thence, until the time of the last notice; that his residence was there; and that the general residence of Joshua L. Carew, the maker of the notes, was in Detroit, during the same period.

The defendant's counsel objected, in time, to the admission, in evidence, of the said notices of protest on the notes in suit, on the ground, that said notices were insufficient on their face, in not

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properly nor sufficiently describing nor identifying the particular notes referred to. The Court overruled the objection, and the defendant thereupon excepted.

It appeared, at the trial, that the four notes were drawn, signed and endorsed at Detroit, and, subsequently, delivered by the maker, J. L. Carew, to Garret W. Ryckman, in, and who then resided in, the City of New York, for hops previously sold by Ryckman to Carew, for, and, in fact, used in a brewery at Detroit. That, at the times when such hops were so bought and used, the defendant had such an interest in the business of that brewery, as would make him and Carew liable, as partners to third persons, for articles bought for and used in conducting the business of such brewery; but it did not appear, that Ryckman knew that fact when he sold the hops or received the four notes.

By an agreement, dated the 1st of January, 1849, prior to the date of the notes, but subsequent to the purchase of the hops, a partnership was formed between the defendant, J. L. Carew, Geo. W. Barnes and B. Hubbard, all, then, of Detroit, for the prosecution of the brewery business. The property and assets of the business, in which the defendant was then interested with Carew, was transferred to the new firm, and, in consideration of that, among other things, the new firm agreed to issue their notes, to the amount of \$10,000, and apply the same, or the avails thereof, to the payment of outstanding liabilities against the old concern of Carew. But a small part of that amount was so issued or applied.

When the testimony on both sides was concluded, the defendant's counsel moved to dismiss the complaint, on the grounds—

1. "That the defendant is an endorser, and can be sued only as an endorser, and cannot be made a maker.
2. "To make the defendant liable, for the purchase of the hops mentioned in the complaint, the plaintiff should have sued as the assignee of Ryckman, as to the claim for the hops. And the proof is, that he is only the holder of the notes; and there is no allegation or proof that he is the assignee of Ryckman, as to the claim for the hops.
3. "If the defendant was a partner of Joshua L. Carew, and, as

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such, a maker of the notes, and not entitled to notice of protest, Carew should be a party to the suit.

4. "If Bela Hubbard was a partner, he should be made a party to the suit.

5. "The plaintiff, having failed to prove notice, to the defendant, of the protest of the notes, as endorser, he cannot charge him as a maker of the notes.

6. "No partnership, between the defendant and Carew, is proved.

7. "The notices, given to the defendant and above contained, were insufficient to charge him, as endorser, by the laws of New York.

8. "They were also insufficient to charge him, as endorser, by the laws of Michigan. And the laws of Michigan govern the contract of endorsement; and the defendant is, therefore, not liable as endorser."

His honor, the presiding Justice, said, "The plaintiff sues the defendant as endorser and means to hold him as endorser, and insists that the defendant knew which note the notices of protest related to. The defendant insists that the description of the note, contained in the notice, is imperfect. The plaintiff then proposes to show that the defendant knew, when each notice was received by him, to which note it referred.

"The counsel for the defendant claimed that the notice must, affirmatively, convey the notice of protest, and designate the note protested, with such particularity as to show, on its face, what note was due.

"The counsel for the plaintiff then proposed to submit to the jury a single question, as to each note, viz., whether the defendant, at the time he received the respective notices of protest, produced by him, knew which note each notice referred to? and then to take a verdict, subject to the opinion of the Court at General Term.

"The counsel for the defendant objected that there was no question for the jury to pass upon, and renewed his motion to dismiss the complaint, on the grounds, as above stated.

"The Court denied the motion to dismiss the complaint, to which the defendant's counsel excepted. And the Court ordered the questions hereinafter stated to be submitted to the jury; to which the counsel for the defendant excepted, on the ground that the

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cause presented no such questions for the jury, and that there was no evidence authorizing a verdict for the plaintiff on such questions.

"The defendant's counsel also asked the Court to instruct the jury, that there was no evidence, authorizing a verdict in the affirmative, on any of said questions; which the Court refused, and the defendant's counsel thereupon excepted."

The counsel for the respective parties having addressed the jury, the following questions were submitted to them by the Court, viz.:—

"1. Did the defendant, when he received the notice dated 5th February, 1850, know that it was intended to inform him of the presentment and non-payment of the note dated April 2d, 1849, payable in ten months?

"The jury answered, Yes.

"2. Did the defendant, when he received the notice of 5th of March, 1850, know that it was intended to inform him of the presentment and non-payment of the note dated April 2d, 1849, payable in eleven months?

"The jury answer, Yes.

"3. Did the defendant, when he received the notice of the 5th of April, 1850, know that it was intended to inform him of the presentment and non-payment of the note dated April 2d, 1849, payable in twelve months?

"The jury answer, Yes.

"The Court then directed a verdict for the plaintiff, for \$3415.72 damages, subject to the opinion of the Court at General Term, on a case to be made, to be heard there in the first instance, with liberty to the Court to dismiss the complaint if so advised, and with the liberty to either party to turn this case into a bill of exceptions. Judgment suspended meantime."

Wm. Curtis Noyes, for plaintiff.

I. This Court, on the previous hearing, disposed of all the questions presented upon the facts as they then appeared, and nothing now remains open, so far as those facts are concerned, except the question, whether the notice to the defendant, as the endorser of

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the notes in suit, was sufficient. (*Cook v. Litchfield*, 5 Sandf. S. C. 330; S. C., 5 Seld. 279.)

II. The notes, in suit, were given for a debt contracted by a firm of which the defendant was a dormant partner, and for which debt he was liable.

III. He received an assignment of all the effects of the firm, and the one which succeeded it, and agreed to pay the notes in suit, and is bound to pay them under that agreement, as well as under the agreement of June 15th, 1852.

IV. The evidence, to apply the respective notices of protest to the several notes, was competent, and the jury have found that the notices of protest did actually communicate, to the defendant, notice of the presentment and protest of the notes in suit, as they severally became due, and their finding, is conclusive on the question of notice. (*Cayuga Co. Bk. v. Warden*, 1 Com. 413; S. C. 2 Seld. 19.)

Chas. Tracy, for the defendant, argued, among others, the points following, viz.:—

I. The notices of protest were insufficient. (5 Seld. 279, *Cook v. Litchfield*.)

II. The special findings of the jury, that the defendant knew, in each case, which note was intended, should be set aside, or treated as a nullity. (1) The Court erred in submitting those questions to the jury, and the defendant took an exception. No evidence, of any sort, had been given to show the fact of the defendant having such knowledge; and notice in these cases is to be proved, not presumed. (Parson's Merc. Law, 115; 5 Seld. 279, *Cook v. Litchfield*; 2 Hill, 587, 595, *Ransom v. Mack*.) (2) The verdict on those questions is wholly unsupported by evidence. It is against the evidence and against law.

III. The defendant is not liable as joint maker, with Carew. The complaint alleges, that the defendant and Carew, having been partners under the name of Joshua L. Carew, they afterwards made these notes by that name, to be used in liquidating the debts of such partnership. This allegation is not sustained.

IV. The supposed debt to Ryckman, for hops, is no ground to support the present action. 1. That debt is stated to have been contracted in October, 1846. It was a debt to Ryckman, and not

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to the plaintiff. 2. The debt was released, on the delivery of these notes. The debt, therefore, has no importance in this case, unless the consideration of the notes should come in question. 3. That debt was not assigned to the plaintiff; and, he being a mere endorsee, cannot sue on the original consideration. (4 Sandford, 93, 97; *Morris v. Hudson*, 1 Hill, 577; *National Bank v. Norton*.) 4. Such supposed debt was barred by the statute of limitations before this action was brought. 5. These notes, in the hands of Cook, the plaintiff, are mere commercial paper, having for maker Carew alone, and for endorsers first, Litchfield, and second, Ryckman. The plaintiff can hold the defendant only upon his contract as endorser.

V. There is nothing in the case excusing the plaintiff from giving due notice of dishonor, or rendering defendant liable, without such notice. 1. The articles of partnership between Carne, Carew, Litchfield and Hubbard, make no provision for such notes as these. 2. At the date of those articles, (1st January, 1849,) the only debt to Ryckman outstanding against Carew, or against the Detroit brewery establishment, amounted to barely \$43.05. 3. The agreement between Carew and the defendant, made 15th June, 1852, has no influence on this question. These notes were past due and dishonored long before that agreement was made, as they matured in January, February, March and April, 1850. The defendant in June, 1852, being already discharged of his conditional obligation as endorser, could not be made absolutely liable by any thing in that agreement. Nor is that agreement a general assignment of Carew's property, but only of certain specified property. (13 Barbour, 163, 165, 166; *Bruce v. Lytle*.) 4. Nor does the obligation of the defendant, to release Carew, relate to any transactions except to those of the firm and firms, containing Hubbard or Carne; and a mere promise to the maker of a promissory note to indemnify him, does not change the contract of the endorser with the holder of such note.

VI. If any action upon these notes would lie against the defendant, by reason of any of the alleged copartnerships or transactions with Carew, or with Carne, Carew & Co., the present action must fail, for defect of parties. If the defendant is alleged to be a joint maker with Carew, as a member of the supposed firm of J. L. Carew, then Carew must be joined as co-defendant. If the de-

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fendant is alleged to be a joint maker with Carew, Carne, and Hubbard, as a member of the firm of Carne, Carew & Co., then Carew and Hubbard must be joined as co-defendants. This objection was duly taken by the answer, and on the trial.

VII. On the whole record, judgment should be given for the defendant, and the complaint should be dismissed, under the stipulation contained in the case.

BY THE COURT. BOSWORTH.—The defendant is the payee and endorser of four several promissory notes made by J. L. Carew, and dated, "Detroit, April 2d, 1849." Each is for the sum of \$740, with interest. All are of precisely the same terms, except that one is payable nine, one ten, one eleven, and the other twelve months after date. This action is brought on the three notes which matured last.

Each note, on the day it matured, was duly presented for payment, and payment of it was demanded and refused. Each note was, therefore, properly and duly protested. The important question is, was sufficient notice thereof given to the defendant, as endorser, to charge him?

A notice, in each case, was mailed on the proper day, accurately directed, and was actually received by the defendant.

The notice, inasmuch as it stated that the note to which it referred was "duly protested for non-payment, on the day that the same became due," was sufficient to charge the endorser, if good in other respects. That has been finally and definitely determined, in an action between these parties upon the notes in question. (*Cook v. Litchfield*, 5 Seld. 279—291.)

The notes, after being endorsed by the defendant, at Detroit, were returned by him to the maker, who first negotiated them in the City of New York, by delivering them there to one Ryckman, who endorsed them to the plaintiff. The endorsements receiving their first vitality as contracts from the negotiation of the notes by the maker in New York, the law of New York must determine the sufficiency of the notice in each case.

We start, then, with the propositions duly established, that there was a valid presentment and protest of each note, and that a notice was served in time to charge the endorser, and that each notice was sufficient to inform him, that the note to which it re-

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ferred had been presented for payment on the day it became due, at the proper place, and that payment had been refused on being then and there demanded.

It has already been decided by the Court of Appeals, that in determining the sufficiency of the notices from their contents, and in view of the mere fact, that there were four such notes as have been described, the notice first served was sufficient to charge the defendant, as endorser of the first note, (meaning by first note, the one which first matured,) and that neither of the other notices was sufficient to charge him as endorser of either of the other three notes.

The Court of Appeals, in the opinion delivered, say that the notice first served was sufficient to charge him as endorser of the first note, because it informed him that a note, made by J. L. Carew, for \$740, with interest, dated April 2, 1849, and endorsed by him, was, on the day the same became due, duly protested for non-payment—only one of the four had fallen due at the date of the notice. “The notice pointed out with sufficient certainty which of the four notes had then been dishonored, and distinguished it from the other three, by reference to the time of its maturity” (5 Seld. 287).

This being so, the defendant, when he received the second notice, dated on the day when the second note matured, knew that it did not refer to the third or fourth note, because neither of them had then become due. Yet it notified him of the dishonor of a note which had become due, and by language which informed him that it did not refer to the third or fourth note.

It, therefore, could only refer, either to the first or second note. He had received, a month previously, due notice of the actual dishonor of the first note: the date of the second notice was one month subsequent to the day of the maturity of the first note, and was on the day the second note matured.

If he knew that the second note matured on the day of the date of the second notice—if he was bound to infer or suspect that the holder of the notes, in causing the second notice to be sent, would act with a view to protect his interests, and that the notary, in mailing it, was acting in the discharge of his duty—it is difficult to conceive that the defendant could have imagined that it was sent to inform him of the dishonor and due protest

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of the first note. To indulge in such a conjecture, he must be allowed to forget, or regard it as immaterial, that the first note had been duly dishonored, and that he had been duly notified of it, a month previously : as a notice of the dishonor of that note, it was unnecessary, even if mailed in time, and wholly nugatory, by reason of being mailed too late, to charge him, by force of such notice, as endorser of the first note.

The marginal entries on the second notice, *viz.* :—

"\$43.60 interest.

"740.00

"\$783.60," would naturally, as it seems to us, be understood to mean, that interest on the note protested, at the time of the protest to which the notice referred, was \$43.60 : so construed, it would clearly identify the second note, as the one to which the second notice referred, because no other note of the series could be protested on the day of its maturity, and have, on the day of its maturity, that amount due, for interest accrued.

But the Court of Appeals has determined, that these facts—however persuasive they may be to convince, that the endorser must have known that the second notice referred to the second note—are not, of themselves, sufficient to make it a good notice of the dishonor of the second note, or to charge the defendant, as endorser of it.

The features in the action, as now presented, which distinguish it from the action as it was presented when before this Court, and the Court of Appeals, as reported in 5 Sand. S. C. R. 330, and 5 Seld. 279, are these :—

On the trial of the present action, Ch. Justice Oakley, before whom it was tried, submitted to the jury, with respect to the second notice, this question :—

"Did the defendant, when he received the notice dated 5th February, 1850, know that it was intended to inform him of the presentment and non-payment of the note dated April 2d, 1849, payable in ten months?"

The jury answered, "Yes."

A question in like form, and adapted to each of the two other notices, by describing its date, and the notes maturing on their respective dates, was submitted to the jury, and they answered to each question, "Yes."

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The defendant's counsel objected to the submission of each of these questions to the jury, on the ground, that the cause presented no such questions for the jury, and that there was no evidence authorizing a verdict for the plaintiff on such questions, and excepted to the submission of the questions. He also asked the Court to charge the jury, that there was no evidence authorizing a verdict for the plaintiff on such questions, and excepted to the refusal of the Judge to so instruct the jury.

The plaintiff's counsel contends, that it is competent for a plaintiff, when the terms of a notice are equivocal on their face, in such sense, that they do not necessarily identify the note to which it refers, to prove extrinsic facts known to the defendant at the time, in the light of which the notice may be deemed to have informed him of the precise note to which the notice referred; and that, on such facts, and in connection with the notice, it may properly be left to the jury to determine, whether the endorser of the note knew, on receiving the notice, to what note it related.

He also insists, that such extrinsic facts were proved, on the trial of this action, as made the submission of the particular questions put to the jury, in this case, proper.

The latter proposition is denied by the defendant's counsel. He also insists, that there is no conflict of evidence, in respect to the matters called extrinsic facts, and that, in such a case, the sufficiency of the notice is a question to be decided by the Court alone, and not by a jury.

If extrinsic facts may be proved to aid a notice, which is defective, because not sufficiently full in its details, and if such facts were proved, in this case, as leave no reasonable doubt that the endorser, on receiving each notice, knew that it referred to the note maturing on the day the notice bears date, a new trial should not be granted, because the question was left to the jury, instead of being decided by the Court, if the jury have determined it, as it was the duty of the Court to have decided it. (*Miller v. The Eagle Life and Health Insurance Co.*, 2 E. D. Smith, 287.)

We will first consider the question, whether extrinsic facts, known to the endorser, may be proved for such a purpose; and, next, the nature and effect of those proved and relied upon, in

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this action, as being sufficient, to make the notice operate as a good notice to the endorser.

We start with the proposition, settled, in reference to these notices, that, in an action upon either note alone, the notice of protest, dated on the day such note matured, would be sufficient, of long as it was not made to appear that any other note, of that date and amount, had been made by J. L. Carew, and endorsed by the defendant.

It is only by proving the fact, that there was another note, or that there were other notes, outstanding, to which the terms of the notice would be as applicable as to that maturing on the day of the date of the notice, that such notice would be rendered so equivocal, as to be insufficient.

If, therefore, extrinsic facts may be proved, to establish the insufficiency of a notice which would be held sufficiently definite, if these facts had not been proved, it is quite clear, that the effect of such facts may be obviated, by the proof of other facts known to the endorser, which establish, that the notice must have informed him of the particular note to which it referred.

In *Cook v. Litchfield*, (5 Seld. 289,) the Court say, that, "in determining whether the description of the note or bill is sufficient, the circumstances of the case, and the defendant's knowledge of these circumstances, may be taken into consideration; and, therefore, where the notice to the drawer of a bill of exchange, was, that his draft on A B was dishonored, the notice was adjudged to be sufficient, until it was shown, that there was another bill, drawn by the defendant on A B, for which the one in question might be mistaken."

But the adjudged cases have gone so far as to hold, not only that a notice, which fails to give such details of the note as will, of themselves, identify it, clearly and distinctly from all others, may be sufficient, when construed in the light of facts existing at the time, and known to the defendant; but also, that a notice, erroneous in some of its particulars—and, therefore, calculated to mislead to such extent as errors of that character might tend to produce that result—would be sufficient, when construed in the light of facts which demonstrated, with reasonable certainty, that the endorser knew what note it was to which the note referred, notwithstanding, in some particulars, the notice had misdescribed it.

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The Cayuga Co. Bank v. Warden & Griswold, (1 Com. 413, and 2 Seld. 19,) is a case of the latter description.

We think, that extrinsic facts, known to an endorser at the time he receives a notice, may be shown, and that the Court, in construing the notice and determining its sufficiency, may construe it in the light of such facts; and that if, on being thus construed, there can be no reasonable doubt that the endorser knew that the notice related to the note maturing on the day such notice bears date, the notice must be held sufficient. This doctrine is not only not repudiated in *Cook v. Litchfield*, (5 Seld. 289,) but is expressly asserted, and was a point, in judgment, in the *Cayuga Co. Bank v. Warden & Griswold*.

The only question of substance left, relates to the extrinsic facts proved, and the light they shed upon the terms of the several notices of protest, and the sufficiency of the notices, when construed, with reference to those facts.

I think we may start with the assumption, that slight circumstances, known to the defendant at the time each successive notice was received, to point it to the note maturing on the day such notice bears date, are all that can be required in a case like the present.

The notice first received, informed him of the dishonor and protest of the first note, (the one at nine months,) and identified and distinguished that note, as the one of the four which had been protested, and to which that notice related.

The notice secondly received, was dated on the day the second note (the one at ten months) matured, and was mailed and post-marked on the next day thereafter. It informed the endorser of the due protest of a note, on the day the same became due, and, therefore, informed him it did not relate either to the third or fourth note.

There being, in the margin of the notice, the figures and words,
" \$43.60, interest.
" 740.00

"\$783.60," it might, as it seems to us, be reasonably construed to mean, that interest on the note, so protested, at the time of such protest, and which was the day the note referred to in the notice became due, amounted to \$43.60. That could only be

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true of the second note, and, so construed, the notice would distinguish and identify that note from either of the others.

The third notice, on a similar construction, would identify the note at eleven months as the one to which it referred, and of the dishonor and protest of which it gave information.

In the *Cayuga Co. Bank v. Warden*, *supra*, the notice of protest, in the body of it, described the note as one "for three hundred dollars." It was, in truth, a note for \$600. In the margin of the notice were the figures "600", without any prefix, except the character "\$," or any addition to indicate for what purpose they were written, or to what they related.

Jewett, J., in 1 Coms. 418, says:—"Now, having the accessory facts, namely, that this note was the only note in this bank drawn by S. Warden, and endorsed by the defendants, and the intimation conveyed by the figures "600," upon the margin of the notice, who can doubt but that this notice conveyed to the minds of the defendants the information that this identical note had been dishonored, although it misdescribed the note, as it respects the sum for which it was made, in the body of it? The defendants, knowing the facts stated, on the receipt of this notice could not, as it seems to me, fail to be apprised, by it, that this particular note had been dishonored."

In the same case, when again before the Court of Appeals, (2 Seld. 26,) Gardner, J., said: "So the design of the notary, in this case, was to inform the endorser of the dishonor of a particular note. Whether he has succeeded, depends, in like manner, upon the terms of the notice. If the subject is there described so as to be identified, upon proof of extrinsic facts, which, in the language of lord Coke, 'stand with the notice,' the object will be accomplished, although the description may not be true in every particular; and the defendant would be bound by it, although as dull of apprehension as his counsel proposed to prove him."

So it may be said, in this case, with much force, that the defendant knew he had endorsed a note made by the person described as maker, and of the date and amount named in the notice, and maturing on the day the notice bore date.

Each notice informed him that the note protested was dishonored on the day it matured. And the intimation conveyed

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by the figures in the margin of the 2d and 3d notices was, that the note so protested was for the sum named, and that the interest on it, at the time of such protest, was the sum so stated in the margin. It seems to us, that he could not suppose either of these notices referred to a note previously protested, and of which protest he had been duly notified.

On this trial, it appeared that the defendant received the notices, and gave so much attention to them that he preserved them and produced them at the trial. It thus appears that he received as many notices as he had endorsed notes; that each successive notice so received was dated and mailed on the proper days to protest each successive note as it matured, and to mail the notice thereof, so as to charge him as its endorser.

Whether he preserved them all, so as to be able to demonstrate, on the trial of an action against him, if sued as endorser of the notes, that he could not tell to what note either of the notices, except the first, related, or because he had no doubt to which note each notice referred, and also had an interest in the notes being paid, beyond that arising from the fact of his having endorsed them—different minds may, possibly, differ in their conclusions.

The facts proved show that the consideration of the notes was a sale of Hops, by Ryckman, (to whom the notes were delivered,) to J. L. Carew, for, and which were used in, prosecuting the business of the Detroit brewery. That at the time the hops were purchased and so used, the defendant and Carew had such an interest in the business of the brewery as would make them liable, as partners to Ryckman, in an action for hops sold and delivered, though Ryckman does not seem to have been informed of that fact.

So long as a cause of action, based on a contract for the sale and purchase of the hops, would not be outlawed, and, by returning the notes after they had matured, the defendant and Carew might be sued, as partners, on such contract; the defendant, as a person originally liable to Ryckman, for the consideration of the notes, had an interest in knowing whether they were subsequently paid.

The notices were convenient memoranda to remind him, both of his liability, as endorser, and of the possibility of his being charged as a party, in law, to the contract for the sale and purchase of the hops.

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They might, also, have been preserved, in the expectation that he would be sued, as endorser, in the Courts of Michigan, in which State he resided, and with the confident expectation, that, although each notice informed him, accurately, that it referred to the note maturing on the day of its date, yet, they would be held insufficient by the Courts of that State, on the mere ground, that they did not, in terms, state, that the notes were presented for payment at the bank at which they were made payable, but only stated, that the notes were "duly protested for non-payment," on the day that the same became due.

But he had a still further interest in the payment of these notes by Carew.

By an agreement, dated the first of January, 1849, prior to the date of the notes, but subsequently to the purchase of the hops, a partnership was formed between Carew and the defendant, and Geo. W. Carnes and B. Hubbard, all, then, of Detroit, for the prosecution of the brewery business.

The property and assets of the business, in which the defendant was interested with Carew, were transferred to the new firm, and, in consideration of that, among other things, the new firm were to issue their notes, to the amount of \$10,000, and apply the same, or the avails thereof, to the payment of outstanding liabilities against the old concern of Carew.

But a small portion of that amount was so issued or applied. Had they been issued and applied to the amount agreed upon, the defendant would have had a pecuniary interest in their application to the payment of the notes in question, and to the absolute extinguishment, by such means, of all personal liability, as a partner of Carew, to Ryckman, for the hops, for which the notes had been given.

We think, on reading each notice, in the light of these facts, that the defendant, as he received each successive notice, instead of being in doubt as to the note to which the notice referred, must have understood it to mean; that a note, maturing on the day the notice bore date, had been on that day protested, and that the holder looked to him for the payment.

Why is an endorser, who is notified of the dishonor of a note for \$175, when the note endorsed by him was for \$200, or who is notified of the protest of a note for \$300, when the one he had

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endorsed was for the sum of \$600, held to be concluded, as to the sufficiency of the notice, on its being proved, that he was endorser of only one note, made by the maker named in the notice, or payable at the place where the notice states the one so protested to have been payable?

Proof of such a fact, does not enable the Court to give any meaning to the terms of the notice differing from their obvious import, or render their description of the note more accurate.

The object of notice is, to inform the party to whom it is sent, that payment has been refused by the maker, and that he is held liable. Hence, such a description of the note as will give sufficient information to identify it, is all that is necessary.

It cannot be maintained, that every variance, or omission of a descriptive particular, however immaterial, is fatal. It must be such a variance, or omission, as that the notice will convey no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him—if it conveys to him the real fact, without any doubt—the variance or omission cannot be material, either to guard his rights or avoid his responsibility. (*Dennistoun v. Stewart*, 17 How. U. S. 606; *Bank of Rochester v. Gould*, 9 Wend. 279; *Snow v. Perkins*, 2 Gibb's Mich. 238; *Sasscer v. The Farmer's Bank*, 4 Md. 400.)

Hence, when an endorser receives notice, that a note, endorsed by him, and made by a person who is named, and payable on a specified day, was, on that day, duly protested, he is bound to understand, if he has endorsed but one note, made by such person, that such note has been dishonored, although the notice misdescribes the note, either by stating the note to be larger or smaller than the one he had actually endorsed.

He is not at liberty to regard the notice as telling the truth in every particular, and claim exemption from liability on that ground, so long as it states enough to enable him to determine, with the aid of other facts, then known to him, that it refers to the note which it was designed to inform him was dishonored. (*Mills v. The Bank of the U. S.*, 11 Wheat. 376; *Bank of Alexandria v. Swan*, 9 Peters, 33.)

In the present case, the second notice, for instance, states no one particular inaccurately, and, therefore, was not calculated to

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mislead, by stating the note protested to be different, in any of its terms, from the note as it actually reads.

The only defect which can be pretended is, that it did not enable the defendant to know whether it referred to a note maturing on the day of the date of the notice, or to one maturing a month prior thereto.

To this, we think, it may be replied, you could not have supposed it referred to a note maturing one month prior to the date of the notice, because you knew *that* was dishonored on the day it fell due, and notice thereof was mailed to you the next day, which notice you received, and preserved, and now produce. You also knew, that such a note, and only one such note, matured on the day the notice is dated.

The plaintiff could have no motive to cause a notice to be sent a month after the protest of a note, in respect to which he had done regularly, at the time, every thing essential to charge you as endorser. The notary must be deemed to have been acting in the discharge of his duty, and designing to give you notice of acts which would create a liability on your part as endorser. By referring his notice to the note maturing on the day the notice was dated, he was doing that which was proper and necessary to be done, to fix your liability as endorser of a note maturing that day, and so far as appears, the only one which then matured.

The entries on the margin of the notice, might, reasonably, have been understood to mean, that the sum there stated, as the amount of interest due on the note protested, was the amount due on the day of its protest, and not the amount due one or two months after it was protested.

The statement, as to the amount of interest due, thus understood, could not apply to any note except one falling due on the day the notice is dated.

The same reasoning and considerations apply, to the third notice, with as much force as to the second.

We think the facts proved on this trial lead, irresistibly, to the conclusion, that the defendant could not have been misled nor left in doubt as to the note to which either notice referred. On the contrary, he must have believed and understood, that each successive notice received, was designed to refer to, and to inform him of the dishonor of the note maturing on the day such notice

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was dated, and that the holders looked to him for payment thereof.

If, on such a state of facts, the Court should determine what knowledge the notice, in the light of such facts, conveyed to the endorser, instead of submitting it to the determination of a jury, the defendant has not been prejudiced by such submission, if it was the duty of the Court to have held the notice sufficient.

The Court, by submitting the question to the jury, must have deemed the evidence sufficient to justify a verdict that the defendant knew, what they have found he knew.

It has done no damage to the defendant, that their verdict shows that, in their judgment, he knew to what note each notice related.

If it was a question of law, to be decided by the Court, on evidence not conflicting, whether the notice was sufficient, the case is properly before the General Term, on a verdict subject to its opinion on questions of law.

We think either notice was sufficient, when construed in the light of all the facts proved, to inform the endorser that it referred, and was intended to refer to, and inform him of the dishonor of a note maturing on the day such notice was dated, and that the holder looked to him for the payment of such note. And that the jury having found, as it was the duty of the Court to have decided, (if the question is to be treated as one to be determined by the Court only;) the defendant was not, in any way, prejudiced by the submission to the jury of the questions, on which they passed, by their verdict.

A judgment must be entered in favor of the plaintiff on the verdict.

HORFFMAN, J.—It might be sufficient for me to express my concurrence in the views presented by Mr. Justice Bosworth, and with his conclusion. The fact, however, that a decision of the Court of Appeals is pressed, as settling the case in favor of the endorser, induces me to add some observations.

I agree that the decision of that Court precludes us from saying that the facts, apparent on the face of the notices of protest successively made, were sufficient to charge the endorser with the payment of the note now in suit.

But extrinsic facts and circumstances are admissible in evidence

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to make clear an equivocal or ambiguous notice of protest, and to show that the endorser could not have failed to attribute the notice to the note in question.

If a notice, apparently sufficient, may be rendered insufficient, by proof of the extrinsic fact, of there being another note to which it could be applied, then proof can be adduced of other facts to meet and repel that conclusion. The right to go out of the notice to overthrow it, cannot be stronger than the right to support it, by the same species of evidence. Slight testimony, under the circumstances of this case, is all that can be demanded, to fix this endorser; and the facts proven on this trial amply warrant the inference, that this defendant, not only was not misled, but could not have imagined, without gross stupidity, that the notices did not refer, in succession, to the notes due in succession.

The fact, now proven, that all the notices in question were preserved by the defendant, and were produced by him at the trial, is enough, in my judgment, (apart from all other facts proven,) to save the present case from the decision referred to, and to support it within principles, admitted in the judgment of the Court. These facts, according to the reports, did not appear on the former trial.

I consider that we have the right to assume, that the previous notice or notices were before the defendant, at the period of his reception of each successive notice. It is, then, impossible but that the information received was pointed, definite and incapable of being misunderstood.

My difficulty has been, whether the questions, put by the learned Chief-Justice, were matters proper to be left to the jury.

The constitution of our tribunals has given the office of applying the law to established facts, to the Court, that of finding the facts, to the jury.

The question, whether an endorser, asserting that he could not know, from a notice, what note was intended, had not actually matters within his knowledge, which clearly designated the note, may undoubtedly be a matter of fact, to be settled upon evidence, not demonstrative. In such a case, the jury should pass upon it. Admissions, for example, might have been made, and different witnesses have given their respective versions of them. That would be clearly a case within the province of a jury.

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The case of *Houlditch v. Cafty* (6 Scott, 299, 4 Bing. N. C. 411) appears to me a decisive and satisfactory authority upon this point. The action was against an endorser of a bill of exchange. A plea was, that the defendant had not due notice of dishonor. Presentment to the acceptor and dishonor were duly proven. A notice to the defendant was given by a letter, clearly insufficient. And proof was adduced, of a conversation between the defendant and the holders of the bill, in which he expressed his regret that the bill had not been paid.

A verdict was found for the plaintiff. A motion was made for a new trial. The Court hold the letter insufficient notice; but, coupled with the conversation, there was no ground for saying that the defendant did not receive sufficient notice of the dishonor of the bill. And the Chief-Judge concludes:—"The jury found, that the notice was sufficient, and we are not disposed to disturb their verdict." Coltman, Justice, observed: "The jury have found the notice sufficient, and they are the proper judges of the effect of the conversation."

In the *Bank of Rochester v. Gould*, (9 Wendell, 279,) the Judge at the circuit left it to the jury, to say whether they believed that the defendant knew what note it was that had been protested, or had not been misled by the notice. The notice was probably defective. The fact of there being no other note at the bank, and a conversation with the cashier, were the matters adduced in evidence. A new trial was denied. See, also, *McKnight v. Lewis* (5 Barbour, S. C. Rep. 681).

Whatever, then, may be the rule, as to the right of a Judge to withdraw questions of this nature from the jury, I apprehend it is not matter of law, that a question of knowledge of what note a notice of protest referred to, may not be submitted to it (Chitty on Bills, 468, note.) The general exception, then, in this instance, cannot be sustained. And it seems to me quite clear, that there was evidence upon which, a jury might be called on to pass, as to this point.

SCHERMERHORN, *et al.*, Plaintiffs and Respondents, *v.* NIBLO,
Appellant.

1. In an action by vendors, to compel the specific performance of a contract for the purchase of real estate, the relief asked will be granted, even though there be a bare possibility, that the title may be affected by existing causes, which may be subsequently developed, provided, the highest evidence of which the nature of the case admits, and amounting to a moral certainty, be given, that no such causes exist.
2. Thus, when the title of the vendors is that of sole heirs-at-law of a person dying on the 15th of December, 1855, and their contract to sell was made in February, 1856, and the action was tried in January, 1857, and, after thorough search, no will of the deceased had been found, up to the time of the trial, and he died leaving personal estate, worth over \$10,000, and his debts and the demands against his estate, so far as ascertained, do not exceed \$500, the possibility of discovering a will, or that other debts and demands may be presented to his administrator, are not sufficient to deprive the vendors of the right to a judgment for a specific performance.

(Before Bowditch and Howland, J. J.)

Heard, Nov. 10th; decided, Nov. 28th, 1857.

THIS action is brought by John and Alfred Schermerhorn, and Maria Craven, by her next friend, against William Niblo, to compel a specific performance by him of his contract with them, of the date of the 19th of February, 1856, to purchase of them a house and lot in West 24th street, in the City of New York. It was defended on the ground, mainly, that he was not bound to accept such a title as the plaintiffs tendered, and were able to give.

It was tried in January, 1857, before Mr. Justice Duer, without a jury, who gave a judgment granting the relief prayed for, and from that judgment the defendant has appealed to the General Term. Judge Duer's conclusions of law and of fact were as follows, viz.:

"*First.*—As matter of fact, I find and decide, that the plaintiffs were the sole heirs-at-law of Peter B. Schermerhorn.

"*Second.*—As matter of fact, I find and decide, that no will executed by him had been found, after thorough search for the same, and that, upon the ground of his intestacy, letters of ad-

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ministration had been granted to George R. J. Bowdoin, upon his estate.

Third.—As matter of fact, I find and decide, that the value of the personal estate of said Peter B. Schermerhorn, was \$10,000, and that his debts, so far as known, did not exceed \$500.

Fourth.—And as matter of law, upon the foregoing facts; the agreement of sale, and the refusal of the defendant to comply with the same, and to accept the deed, and the fact that the said Peter B. Schermerhorn died seized, in fee, of the premises in question, being admitted by the pleadings, I do find and decide, that no proof has been given, on the part of the defendant, of the existence of any debt beyond the amount admitted, nor any reason shown to justify the belief or suspicion that Peter B. Schermerhorn had ever executed a will; the bare possibility that the title which the plaintiffs were competent to give might be defeated, by the future proceedings of creditors, or the production of a will, was, and is, not sufficient ground for releasing the defendant from his agreement, and denying to plaintiffs the relief demanded.

Fifth.—And, as matter of law, I do further find and decide, that the plaintiffs are entitled to judgment, decreeing a specific execution of the contract of sale, but without costs, and that judgment be entered accordingly.

“Dated January 31, 1857.”

The defendant excepted to the decision and finding of the said Justice, on the matters of fact, as stated and contained in the second and third clauses of said decision; also to his decision, as matter of law, contained in the fourth clause; and also to his finding and deciding that the plaintiffs were entitled to judgment, decreeing a specific execution to the contract of sale contained in the fifth clause of said decision.

Some portions of the testimony are stated in the opinion of the Court.

C. J. & E. De Witt, for Appellants.

The decree of this Court, made at Special Term, should be reversed. Because—

I. The plaintiffs had not, at the time of the tender of the con-

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veyance to the defendant, and his refusal to accept the same and complete the purchase, nor had they at the time of the trial, a marketable title to the premises in question.

1. The lands of the deceased could be sold for the payment of his debts, on the application of the administrator, at any time within three years after the granting of letters of administration, and any creditor of the deceased could compel a sale for the payment of debts. The debts of the deceased are thus made a lien upon the land for three years at least. (2 R. S., p. 100, § 1, marginal paging; Laws of 1837, p. 536, § 72; Laws of 1843, p. 228, § 1; *Hyde v. Tanner*, 1 Barb. S. C. R. 75; *Ferguson v. Brown*, 1 Bradford R. 10.)

2. The supposed title of the plaintiffs, as heirs-at-law, might be defeated by the production of a last will and testament of the deceased within four years after his death. (1 R. S. 748, § 3.)

The fact, whether there were creditors of the deceased, or whether there was sufficient personal property to pay his debts, or whether he made a will, could not be determined in this action. No proof or proceedings taken herein would conclude a creditor, nor any person claiming under a will of the deceased, and in such a case a purchaser should not be compelled to take. The exceptions to the evidence on these points were well taken. (*Lovens v. Lush*, 14 Vesey, 548; *Smith v. Death*, 5 Madd. 371; *Atkinson on Titles*, p. 391, etc. 404, etc. 590, etc. See also *Pyrke v. Waddingham*, 17 Eng. Law & Eq. 584.)

II. But even if it appeared on the trial that the plaintiffs could then give a good title, the defendant should not have been compelled to take.

1. On the first day of May, 1857, when the contract was to be performed, and when the deed was tendered, the administrator had not advertised for creditors to present their claims. It was not then in the defendant's power to decide, nor could this Court have then determined, with any certainty, the questions of fact upon which the validity of the title depended.

2. The defendant properly refused to take, on the ground that the plaintiffs could not, at that time, give him a marketable title, and he then elected to rescind the contract. If the plaintiffs were unable, on that day, to give a marketable title, the defendant had a right to rescind the contract, and it could not after-

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wards be enforced against him. (*Dominick v. Michael*, 4 Sand. Superior Ct. R. 374.)

III. It is no answer to these objections to say, that if they prevail, heirs-at-law will be unable to sell, and compel purchasers to take until after the lapse of three or four years from the death of the intestate. Heirs-at-law may sell and convey immediately upon the death of their ancestor, and all difficulties will be obviated by their contracting to sell the title which they really have, and no other. Purchasers may then determine what they will pay for such a title. It is not pretended, nor is there any proof in this case, that the plaintiffs professed to sell only the title which they had as heirs-at-law of the deceased. The defendant contracted for a good and marketable title, and knew nothing of the character of the plaintiffs' title.

IV. There should have been judgment for the defendant, and a reference to ascertain the amount of damages, etc., sustained by him.

J. Larocque, for Respondents.

BY THE COURT. *Bosworth, J.*—The plaintiffs are the sole heirs-at-law of Peter B. Schermerhorn, deceased. He died, seized of the premises in question, in fee, free from all incumbrances. If he died intestate, owing no debts, the title of the plaintiffs, as his heirs-at-law, is as perfect and absolute, as was his own, at the time of his death.

If their title was one to which the defendant had no right to object, the judgment appealed from is free from error.

The deceased died on the 20th of November, 1855. On the 15th of December, 1855, the Surrogate of New York, (the county in which P. B. Schermerhorn resided and died,) on proof satisfactory to him that P. B. Schermerhorn died intestate, granted letters of administration on his estate to George R. J. Bowdoin.

On or about the first of May, 1856, the plaintiffs tendered to the defendants, a full covenant warranty deed of the premises in question. This action was brought to trial on the 22d of January, 1857. It was proved that diligent and proper search had been made for a will of the deceased, and that none could be found.

It was also proved, that on the 8th of June, 1856, an order was obtained by the administrator to advertise for creditors to present their claims on or before the 10th of January, 1857; that notice of the order had been duly published, and that claims to the amount of \$500, only, had been presented.

It was also proved, that the personal estate of the deceased amounted to about \$10,000, and that he was tenant in common with the other plaintiffs in property worth from \$70,000 to \$100,000, and was interested in still other real estate.

This evidence demonstrates, with a high degree of moral certainty, that the title tendered was perfectly good.

It is true, there is a possibility, that a will may be discovered and established which may affect the title. There is also a possibility, that claims of creditors may be presented and established which will not only exhaust the personal estate, but which may make it necessary to resort to the real estate of the deceased to obtain satisfaction of such claims.

But the possibility is so slight as to be destitute of substance, and is not sufficient to justify the defendant in refusing to perform his contract.

As the law does not regard trifles, a bare possibility that the title may be affected by existing causes which may subsequently be developed, when the highest evidence, of which the nature of the case admits, and evidence, amounting to a moral certainty, is given, that no such cause exists, will not be regarded as a sufficient ground for declining to compel a purchaser to perform his contract. (*Winne v. Reynolds*, 6 Paige, 407 and 413; *Belmont v. O'Brien*, 2 Kern. 395; *Seymour v. Delancy*, Hopkins' R. 436; *Spring v. Sandford*, 7 Paige, 550.)

The evidence, to the admission of which the defendant excepted, was competent, with a view to establish the facts; that the deceased died intestate, and owing no debts, which could be made the means of impairing the title which the tendered deed, in terms, conveyed.

We think there is no error in the judgment appealed from, and that it should be affirmed.

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THE EAGLE WORKS v. WM. H. CHURCHILL and others.

1. The plaintiffs offered to sell the balance of their stock of cutlery to the defendants, and exhibited a list or invoice thereof, with the prices, which list was represented to contain an approximation to the sizes, quantities and qualities of such cutlery; and the defendants agreed to buy the same, on a credit of eight months, at a deduction of fifty per cent, from the list prices.
2. The cutlery was, soon thereafter, all delivered to and accepted by the defendants. There was delivered with the cutlery a complete invoice of it, containing the actual descriptions, sizes, quantities, qualities, and list prices of the same. The defendants were requested to examine the cutlery, and if any thing was wrong, to inform the plaintiffs immediately. During the stipulated term of credit, the defendants made no objection to the cutlery. They sold and disposed of it.
3. Held, that, there being neither fraud nor warranty, the defendants were liable to pay fifty per cent of the prices stated on the invoice delivered with the cutlery, although the latter invoice varied in some particulars, as to the quantity and quality of portions of the cutlery, from that exhibited at the time of the agreement to purchase.
4. Evidence of the incorporation of a company, under and pursuant to a statute of a sister State, which, such statute declares, shall be deemed sufficient, will be held sufficient in the courts of this State, to prove the fact of such incorporation, provided, that due proof of the existence and contents of such statute shall also be given. (Per Hoffman, J.)
5. In an action by a corporation (proved to have been duly created) against a person, upon a contract made by him with such corporation, it cannot be set up, as a defence, that the corporation has been guilty of acts or omissions, which would subject it to a forfeiture of its charter, on proceedings duly instituted for that purpose by the State granting the charter.

(Before Bosworth and Hoffman, J. J.)

Heard, Nov. 10th; decided, Nov. 28th, 1857.

THIS action comes before the Court at General Term, on an appeal, taken by the defendants, from a judgment entered, on the decision of a referee, in favor of the plaintiff, for \$3,121.05.

The action is brought to recover the alleged contract price of certain parcels of cutlery, sold by the plaintiffs to the defendants, about the 8th of April, 1856. The articles, alleged to have been sold, are specified in a schedule to the complaint, in which the several prices are stated, and the aggregate amount; and it is alleged, that the price was to be fixed, by a discount of fifty per

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cent upon this aggregate, and that the cutlery was sold on a credit of eight months.

The answer sets up the defence, of a sale by an invoice or list, produced and shown by the plaintiffs' agent, and that the goods were represented by such agent to be of the description, sizes, styles, quantities and qualities set forth in such invoice, in whole packages, and in good order and condition. That, upon unpacking and examining the articles after they were delivered, they were found not to correspond with such descriptions and representations; that they were not the goods agreed to be purchased, but varied therefrom, greatly, and in many particulars; that they were goods of a lower grade, and cheaper class, than those the defendants had agreed to purchase; inferior in description, sizes, style, quantity and quality; comprising fewer goods of a saleable character, and more of an unsaleable nature; and containing broken packages, and defaced, shop-worn and injured parcels, and parcels with the labels erased, presenting the appearance of a refuse lot, from which the better goods had been sold out or selected.

That, upon discovering the condition of the goods, the defendants offered to return them, and notified the plaintiffs to that effect; but the plaintiffs and their agent refused to receive them, and left them in the defendants' hands, without any further action, until the month of December, and that the defendants held them, subject to the plaintiffs' order.

The defendants aver a willingness to pay for the goods, what they were reasonably worth, making the just deduction for the inferiority; and insist, that a deduction should be made of \$500, from the sum demanded in the complaint, on that account.

The referee, appointed to hear and determine the action, decided as follows, viz.:—

"*First.*—That, about ten days previous to the 8th day of April, 1856, the plaintiffs, through their agent, Moses Camp, agreed to sell to the defendants the whole remaining stock of cutlery of the plaintiffs, at a credit of eight months; that, at the time of said agreement, said agent exhibited to the defendants a list or invoice, which, said agent represented, contained an approximation to the sizes, quantities and qualities of the cutlery so sold, the prices being set opposite each description, from which prices the plaintiffs were to deduct 50 per cent.

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"Second.—That, in consummation of said agreement, the plaintiffs, on the day following, delivered to the defendants a small quantity of said cutlery, and, on the eighth day of April, 1856, delivered to the defendants all the balance of their stock of cutlery, together with a complete invoice of all the cutlery so sold and delivered, containing the actual descriptions, sizes, quantities, qualities and prices of the same, which cutlery, so delivered, the defendants accepted, and have since sold the same in the course of their business.

"And I further find, that the schedule marked A, annexed to the complaint, is a copy of such complete invoice, so delivered to the defendants with said cutlery.

"Third.—That such complete invoice varied from the said list, or invoice, exhibited at the time of making said agreement, and that the prices, so far as the goods corresponded, were the same in each; I therefore find, as a matter of law, that the plaintiffs, on the eighth day of April, 1856, sold and delivered, to the defendants, the goods, wares and merchandise mentioned and described in said complete invoice, so delivered to the defendants, with said cutlery, at the respective prices therein specified for the same, less a discount of 50 per cent. upon the aggregate of said prices, at a credit of eight months.

"And I find, that the aggregate prices of said cutlery, less the said discount of 50 per cent., amounted, in all, to the sum of \$2870.26; and that the credit, given upon such sale, expired on the eighth day of December, 1856; and that the defendants are indebted to the plaintiffs, in the said principal sum of \$2870.26, together with interest thereon, from the said eighth day of December, 1856, to the date of this report; which interest, I find, amounts to \$123.88, and which principal and interest amount, together, to \$2994.14, for which sum of \$2994.14 the plaintiffs are entitled to judgment, with the costs of this action; all of which is respectfully submitted."

Judgment was duly entered on the report, and the defendants also duly excepted to the decision of the referee.

On the trial, one of the defendants gave evidence tending to show that the amount which ought to be deducted from the invoice prices, assuming the facts stated in the answer to be true, was \$927.95.

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On the trial, a point was made, that the plaintiffs could not recover without proof of their corporate existence, and that such proof had not been given. The complaint alleges, that the plaintiffs "are a corporation duly created under, and by the laws of the State of Connecticut, and doing business in the town of Winchester," in said State.

To this the defendants answer, "That they have no knowledge or information sufficient to form a belief," whether such allegations are true.

The evidence on this point, and portions of the evidence relating to the merits, are stated in the opinion of Mr. Justice Hoffman.

Thompson & Kellogg, for plaintiffs.

H. B. Cowles, for defendants, the appellants.

HOFFMAN, J.—First, If there was not a warranty of the quality or value of the articles, and no fraud was practised by the plaintiffs or their agent, the claim for an abatement will be wholly unfounded. The contract of sale was made through Camp, the agent, about ten days before the 8th of April, 1856. On the day following the contract, a portion of the cutlery, which was then in New York, was delivered to the defendant. By the 8th of April, the whole was delivered, with an invoice or list fully made out, and of which a copy is annexed to the complaint. About the 8th or 9th of April, this invoice, or bill, was inspected by the defendants, or one of them. Objections were made to certain articles; there was an offer by the agent for a deduction respecting them; the defendants were then requested to examine the bill as soon as they could; one of them said that it would take two or three weeks to do so. The agent requested them to examine, and if any thing was wrong, to write to the Eagle Works immediately. The address was given; no communication was made by the defendants to the plaintiffs. On the 9th of December, 1856, the credit having expired, the plaintiffs wrote to the defendants, that the bill had fallen due, and they presumed it had been found correct, as they had not heard to the contrary. They forwarded a draft for the amount, which was dishonored.

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In the interim, the goods had been shelved by the defendants and exhibited for sale, and after the defendant, Churchill, knew of their condition. They have been since transferred to other parties.

It would be unjustifiable to allow the defendants to rest for eight months without complaint or action, especially when they were invited to make their objections, and now to insist upon an abatement from the stipulated price, (*Muller v. Eno*, 3 Duer, 421.)

We are of opinion that there was no warranty of the articles, and no fraud practised in the sale. The agent distinctly apprised the defendants that he had made out the list from an old invoice; that it might vary from the true amount and value of the goods, but not substantially. The defendants chaffered to increase the discount, on the ground that it was a job-lot of goods they were purchasing.

2d. But an objection is taken, that the plaintiffs, a foreign corporation, have not established their capacity to sue.

The evidence is this:—

Moses Camp, a witness for the plaintiffs, swears, that the plaintiffs are a corporation, incorporated under the laws of Connecticut. The defendants objected to this mode of proof. The question was reserved. He also proved that it originated five years ago, and that the organization was still kept up.

The plaintiffs also produced in evidence, extracts from a book purporting to be the Revised Statutes of Connecticut of 1854, and from chapter 14 of such statutes. It was agreed, that these extracts, and the statute, might be read from the printed volume.

The Act, under which the plaintiffs claim to have been organized, was passed in 1837. It is found in the Revision of 1849, to which we have been referred. The Revised Laws of 1854 were also produced in evidence, and do not differ, in the sections relied upon, from the former provisions.

Under these provisions, the articles of association produced, and admitted to be genuine, were entered into; dated the 4th of November, 1851.

By another document, it is certified, that The Eagle Works was a joint stock corporation, formed under the laws of Connecticut, on the 4th of November, 1851, to manufacture cutlery, etc., with

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a named capital, divided into eight hundred shares of \$25 each; that the stock had been subscribed for, by the persons named, in the shares and amounts specified. The stock was to be called in as the board should direct. This was signed by three directors and the president, on the 9th of January, 1852; was sworn to, and was received and recorded, January, 10, 1852, by John C. Mather, Secretary of State.

Certificates, sworn to by the president and three directors, are then annexed to the document, showing successive payments of the three instalments of twenty-five per cent. each.

These documents and certificates are attested and authenticated by the Secretary of State of Connecticut, under the seal of the State, on the 13th of April, 1857.

From the case of *The Welland Canal Co. v. Hathaway*, (8 Wend. 480,) and the cases cited, I conclude, that the evidence of the corporation, which would be sufficient in Connecticut, will be sufficient here; except, perhaps, that a public statute must be proven as a fact. The admission to read it from the statute book dispensed with this. "A copy of the charter properly authenticated, should be produced."—Nelson, Justice, in the case above cited.

But when an association becomes incorporated under a general Act, something must be proven to show its organization. A certificate, authenticated by the seal of the State, and apparently conformable to the public Act, must be sufficient.

It is clear, that no subsequent faults or omissions which would work a forfeiture, can be made available to defeat this action, if the corporation was once legally constituted.

In *Caryl v. McElrath*, (8 Sandf. S. C. Rep. 176,) it was stated, that the Court would have probably held, had it been necessary, that the company, having claimed to be organized, and having acted as a corporation, the question of its actual existence was to be tested by the government, and not by parties who had dealt with it.

The objections of the defendants, to the evidence adduced, are, that neither the proof of the preliminary meeting, prescribed in section 199, nor of the advertisement, with a copy of the articles, directed by section 210 to be published, has been made.

As to the first objection, the authorities cited by Mr. Angell,

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(on Corporations, § 638,) are express to the point, that corporations cannot be compelled, at a distant day, to produce the advertisement calling the meeting which organized them. (See, also, 5 Wendell, 478; 10 Johnson, 167.)

This rule is equally applicable to the other objection.

But, besides, a section of the statute, added in 1854, enacts, that a certified copy, by the Secretary of State, under the seal of the State, of the certificate of the president and directors, deposited in his office, for record, of the purposes for which the company was formed, etc., shall be received as sufficient *prima facie* evidence of the due formation, existence and capacity of such corporations in any suit.

It is again urged, that the 212th section provides for annual returns to be made, by certificates, of the situation of the company, comprising various particulars, and that this has been neglected in many particulars. Without comparing the certificates produced with the requisitions of the section, we are satisfied that the objection cannot prevail in this action, even if well founded in fact.

The judgment should be affirmed, with costs.

BOSWORTH, J.—The articles of association, dated November 4, 1851, admitted to be genuine, and conforming to the statute laws of Connecticut, were received in evidence. By them, the subscribers thereto, and who had subscribed for the whole of its capital stock, declare that, "we do hereby associate ourselves as a body politic and corporate," pursuant to such statute, and that the corporate name shall be, "The Eagle Works." The statutes themselves were duly proved and read in evidence. These statutes and these articles are the charter, or act of incorporation. Acts of user, under it, down to the time of the trial, were proved. Certificates of the payment of three several instalments of the capital stock, verified and recorded as such statutes prescribe, and certified in proper form by the Secretary of State, under his seal of office, were read in evidence. This evidence, as a whole, was objected to as "incompetent and insufficient." No grounds of incompetency, or particulars of insufficiency, were pointed out. The statute was competent and sufficient evidence of its contents. It was agreed, that it might be read from the printed book. The

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articles of association produced, being admitted to be genuine, and conforming to the statute, were admissible. Under such a general objection, all the documents were properly admitted, and the only question, on this point, is, do they furnish *prima facie* evidence that the plaintiff is a corporate body. The production of the Act of incorporation, and proof of such Acts of user under it, and of its continuing to act as a corporation, are *prima facie*, sufficient. *Bank of Michigan v. Williams*, (5 Wend. 478,) and cases cited in the opinion of the Court. I think there is no error in the other decisions of the referee, and that the judgment should be affirmed.

Judgment affirmed.

JAMES B. BRADY, Respondent, v. THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Appellants.

The charter of the City of New York, as amended April 12, 1858, requires that all work involving the expenditure of more than \$250, shall be done by contract on sealed bids, and that all such contracts when given, shall be given to the lowest bidder. A contract entered into by the officers of the Corporation in violation of this provision, is illegal and void, and imposes no obligation on the city.

Although bids are advertised for, and received, yet, if they are tested by a comparison which brings into view only a part of the work contracted for, and by such means the contract is awarded to one who was not in fact the lowest bidder, the contract is invalid.

When the officers of the Corporation called for bids for flagging a sidewalk and laying a curb and gutter, and the making of excavation of earth and rock, if any, and stated that the lowness of the bids would be tested only by the price at which the bidders offered to lay the flagging, and curb, and gutter; held, that a contract awarded upon such a test, when it was impossible to determine by such test who was the lowest bidder, was void in respect to the excavation.

Where the contract under which the work is done, is void, because entered into in violation of the charter, the contractor cannot recover for the work in any form —neither under the contract nor as upon a *quantum meruit*.

A subsequent ratification of the contract by the Common Council, whether before or after the work is done, does not make it binding on the Corporation.

Where the officers of a corporation do an act in excess of the corporate power, the Corporation is not bound, and when the statute under which the Corporation acts restricts its action to a particular mode, none of the agents through whom the Corporation acts can bind it in any other than the mode prescribed.

The officers of the Corporation cannot, therefore, in such a case, bind the Corpo-

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tion by accepting the work, or confirming an assessment to pay the expense thereof.

Those who deal with a corporation, the mode of whose action is thus limited, must take notice of the restriction in its charter, and see to it, that the contracts on which they rely, are entered into in the manner authorized by the charter.

(Before DURE, Ch. J., and WOODRUFF, J.)

Heard, October, 1857; decided, November 28th, 1857.

THIS action comes before the Court at General Term, on an appeal by the defendants from a judgment entered against them on the report of a referee.

The action is brought upon an alleged special contract, which the complaint avers was entered into with the plaintiff by the defendants through James Furey, their street commissioner, on the 11th of August, 1854, whereby the plaintiff agreed to set the curb and gutter, and to flag a portion of Eighty-third street, (*i. e.*, from the Third Avenue to Avenue A,) in the City of New York, in accordance with certain specifications annexed to the contract; and the defendants agreed to pay for the work, labor and materials the following prices, *viz.*: for setting curb and gutter stones, forty-five cents per running foot; for flagging, eleven cents per square foot; for removing rock, twenty-five dollars per cubic yard of rock removed. The amount to be paid upon the confirmation of an assessment for the work. That the work has been performed, and approved and accepted, and an assessment has been made for the work, and confirmed by the defendants in Common Council convened, and the entire contract-price is due and payable. The quantities of the respective kinds of work are then stated and averred to have been necessary to the performance of the contract, and, in fact, performed at the request of the defendants, and of their surveyor having charge of the work, as follows:—

4,046 ft. 6 in. of curb and gutter, at 45 cts.	\$1,820.92
15,686 ft. of flagging, at 11 cts.	1,725.46
943 yards of rock, excavated, etc., at \$25,	23,575.00
	\$27,121.38

That the defendants have made payment of 70 per cent. of the amount due, 18,985.27

But refuse to pay the remaining balance, amounting to \$8,136.11 Which balance the plaintiff claims to recover, with costs.

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The answer of the defendants sets out a resolution of the Common Council of the 8th day of June, 1854, ordering the setting of curb and gutter, and the flagging of the street referred to, under the directions of the street commissioner, and avers, that the street commissioner issued proposals, inviting offers or bids for the work, which proposals are annexed to the answer; in response to which four offers were received, the offer of the plaintiff being one. That, excluding from the offers the item of rock excavation, the offer of one J. Hodgkins was the lowest. That only two of the offers included rock excavation, viz., the offer of the plaintiff and that of one McCabe; and that McCabe offered to make the rock excavation at \$5 per cubic yard; and that, in fact, McCabe was the lowest bidder for the whole work, including the actual rock excavation in the calculation.

That the rock excavation was the most important item in the entire work provided for in the proposals and contract; but the defendants deny, that the plaintiff excavated the quantity of rock claimed for.

The answer then sets up the provisions of the amendment to the charter of the city, passed April the 12th, 1853, requiring, that "all work, involving an expenditure of more than \$250, shall be done by contract, on sealed bids, and that all such contracts shall, when given, be given to the lowest bidder;" the general ordinance of the Corporation providing, that no expense shall be incurred by any of the departments or officers thereof, unless an appropriation should have been previously made concerning such expense; and denies, that any such appropriation has been made for the expense of the work in question.

Also, a general ordinance of the Corporation, requiring, that the "proposals for estimates or bids shall contain and state the nature and extent, as near as possible, of the work required."

The answer then avers, that a contract was made by the street commissioner with the plaintiff, by James Furey, (claiming to be authorized, under the said resolution, proposals and estimates, or bids,) to which the answer refers, and which is averred to be the contract mentioned in the complaint; and denying all allegations not admitted, the defendants demand that the complaint be dismissed, etc.

By consent of the parties, the action was referred to a sole

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referee, to hear and determine the same, and all the issues therein. The referee found the following facts:—

“*First.* That the defendants, on the 8th day of June, 1854, duly passed the resolution mentioned in the answer of the defendants.

“*Second.* That, on the 27th day of July, 1854, the street commissioner published the proposal for offers or bids, also mentioned in the answer.”

This notice (or “proposal”) invited offers from persons proposing to perform the work, and described the curb and gutter and the flagging required, the kinds of stone, and the manner of cutting and laying. It stated, that “the street is to be brought to the grade shown on the profiles in the street commissioner’s office; the sidewalks to be regulated with sufficient rise from the curbstones, and the carriage-way to be properly shaped, under the direction of the surveyor;” that “the portions of the sidewalk, on which the flagging is to be laid, shall be levelled to a grade of six inches below the top of the flags, and the intermediate space filled with sand or gravel, and the residue of the sidewalk graded even with the tops of the flags.

It directed that estimators should state, in their proposals, the price per running foot for furnishing and setting curb and gutter stones, including regulating and removing or furnishing earth; the price per square foot for flagging, including the regulating of the sidewalks, and furnishing sand or gravel; also the removal of all surplus material or rubbish, after the completion of the work; and the price per cubic yard for removing rock, if any should be found.

And the notice then further continued; “The following is the estimate of work and materials, by which the bids will be tested, viz.: 3840 running feet of curb and gutter stone, and 15,600 square feet of flagging.”

After some other particulars, not deemed material to be stated, the notice further states, that a strict compliance with the provisions of Title III., of contracts for supplies and work for the Corporation, of the amended ordinances, passed May 30th, 1849, and also as amended October 25th, 1849, will be observed and required in all cases.

The referee found—

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"*Third.* That the lowest bidder upon the data given in such proposals (or notice inviting offers) could not be ascertained.

"*Fourth.* That the contract for said work was awarded by the street commissioner to the plaintiff, as set forth in the case, on the 11th of August, 1854. This contract is, in substance, as alleged in the complaint.

"*Fifth.* That the work was completed in the autumn of 1854.

"*Sixth.* That seventy per cent. of the contract price was paid to the plaintiff by the defendants.

"*Seventh.* That 943 cubic yards of rock were removed by the plaintiff in doing the work.

"*Eighth.* That the assessment list for said work was confirmed by the Common Council, by a resolution passed on the ninth day of August, 1856." This assessment list showed that the amount due to the plaintiff, as the contract price of the work, together with the incidental expenses connected with the work, and the surveyor's, assessor's and collector's fees, was \$28,746, of which the sum of \$23,575 (being 943 yards at \$25) was for rock excavation, as alleged in the complaint. It assessed \$5,093.15, upon the owners of lots along the line of the street, and left \$23,653.85, to be paid by the Corporation of the City of New York.

"*Ninth.* That the surveyor's return and inspector's certificate, were made and filed." The surveyor's return showing the number of yards of rock to be 943, and the inspector's certificate certifying that the curb, and gutter, and flagging was finished according to the contract.

"*Tenth,* and finally. That there is due to the plaintiff, from the defendants, the sum of \$8,566.24, principal and interest, for work performed by him for the defendants."

The referee's conclusions of law upon the facts found by him are stated in the opinion of the Court. From the judgment entered upon the report of the referee the defendants appeal.

A. R. Lawrence, Jr., for the defendants, (appellants,) cited:—

Smith v. The Mayor, etc., (4 Sandf. S. C. Rep. 241;) *Boon v. The City of Utica*, (2 Barb. S. C. Rep. 104;) *Pierpont v. Barnard*, (5 Id. 375;) *Christopher v. The Mayor, etc.*, (13 Id. 567;) *De Baum v. The Mayor, etc.*, (16 Id. 392;) *Hodges v. City of*

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Buffalo, (2 Denio, 110;) *McCullough v. Moss*, (5 Id. 567;) *Head v. The Prov. Ins. Co.*, (2 Cranch, 127;) *Dartmouth College v. Woodward*, (4 Wheat. 636;) *Bank of the U. S. v. Dandridge*, (12 Id. 64;) *Bank of Augusta v. Earl*, (13 Pet. R. 587;) *The Penn. Del. & M. Nav. Co. v. Dandridge*, (8 Gill & Johns. R. 248;) *Homershaw v. Wolverhampton Water Works Co.*, (4 Eng. L. & Eq. R. 426;) *Williams v. Chester & Holyhead R. R. Co.*, (5 Id. 497;) *Cope v. The Thames, Haven, etc. Co.*, (3 Excheq. Rep. 341;) *East Anglian R. R. Co. v. Eastern R. R. Co.*, (7 Eng. L. & Eq. R. 505;) (*McGregor v. Deal & Dover R. R. Co.*, (16 Id. 180.)

A. J. Willard, for the plaintiff, (respondent,) cited:—

Lohman v. The N. Y. & Erie R. R. Co., (2 Sandf. S. C. R. 39;) *Devlin v. The Mayor*, (4 Duer, Rep. 337;) *Trustees of St. Mary's Ch. v. Caggar*, (6 Barb. 576;) *Russell v. Cooke*, (3 Hill Rep. 504;) *Stewart v. Ahrenfeldt*, (4 Denio, 189.)

BY THE COURT. WOODRUFF, J.—The referee has found, as a conclusion of law from the facts proved, that it was the duty of the street commissioner, (in his notice inviting proposals for the work directed to be done by the Common Council) to state the probable amount of rock excavation required, and to include that among the *data* by which the bids or proposals would be tested, and had no power, after excluding that part of the work from such *data*, to still go on and contract for its performance; and that the contract, made by the street commissioner with the plaintiff, was illegal and void as regards rock excavation; and that the plaintiff cannot, by virtue of his contract, recover the stipulated price for rock excavation.

These conclusions are obviously fatal to the plaintiff's claim to recover, as such claim is alleged in his complaint. He has alleged a special contract, and the performance thereof, and claims to recover the stipulated price. The contract proved is found to be illegal and void, and it cannot, therefore, be the ground of recovery.

The referee, however, concludes that the plaintiff is entitled to recover the unpaid balance of the contract price, and upon several distinct grounds, viz.:—

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That the plaintiff, having done the work, was entitled to receive what the work performed in making such rock excavation was reasonably worth; and that the defendants have legal power to pay for work, on the basis of a *quantum meruit*, though it was done without contract, or under an illegal and void contract.

That, notwithstanding the contract under which the work was done was illegal and void, the confirmation of the assessment, made to provide for the expense thereof, amounted to a valid agreement, by the defendants, that the plaintiff should be paid the contract price.

That such confirmation was, in legal effect, an accord, and that satisfaction should be enforced.

And finally, that the plaintiff's claim was a disputed claim which the defendants had power to settle, and that their acts amount to a valid binding settlement, which the plaintiff is entitled to enforce.

It is obvious to observe, that there are no issues in this action adapted to raise the questions, upon the consideration of which the referee has decided in favor of the plaintiff.

The ground of claim set forth in the complaint is, simply, a special contract made with the defendants, duly performed by the plaintiff and his work accepted.

But assuming that the state of the pleadings may be disregarded, and that the plaintiff could be permitted to claim payment as upon a *quantum meruit*, and might recover for the rock excavation what the work of making the same was reasonably worth; then, so far as the judgment proceeds upon this ground, it is subject to what we deem these fatal errors: The referee awards to the plaintiff the whole contract price, and disregarded such evidence, as appeared in the case, tending to show that the rock excavation was not worth twenty-five dollars per yard, (the contract price,) when, in truth, proposals were made to do it at five dollars; and further, the referee refused to receive evidence, offered by the defendants of the actual value of the work, which evidence, so far as the plaintiff's claim was a title to recover what the labor was reasonably worth, was clearly, we think, admissible. It was, perhaps, rejected under the idea that the contract itself fixed the value, by stipulating the price to be paid, and that the value so fixed is conclusive.

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Where parties have, by a valid binding agreement, fixed the price to be paid for work and labor, such agreement is of course conclusive, and even though, by reason of departures from the strict terms of such an agreement, by mutual consent, the claimant finds it necessary to claim payment according to the fair value of his work, the agreement may still bind both, as to the rate of compensation, in particulars conforming to such agreement.

But this rule has no application to an agreement which is itself illegal and void. An illegal and void agreement no more bound the defendants to pay the price stipulated, if the work was done, than it bound them in any other aspect. If it was void, it could neither form the basis of recovery, nor bind the defendants to the measure of liability.

To hold this contract conclusive in respect of price, would be indirectly to sustain it in the very particular out of which the illegality arises. It was not a contract with the lowest bidder; and yet to hold it conclusive as to price, is to bind the Corporation to pay the highest price bidden, without any valid contract or legal consent to any price. The requirement, binding the Corporation to give contracts to the lowest bidder, has especial reference to the price which they may become bound to pay, and the manner in which that price shall be ascertained; and to hold a contract not so awarded, conclusive on that point, is not only subversive of the law, but wholly inconsistent with the conclusion, that the contract is itself illegal.

If the plaintiff claimed the value of his work, he should have proved its value; and the defendants were at liberty to give such evidence, relevant to that point, as they might be able. If the instrument alleged to be a contract was entered into by the defendants' officers, in a manner not authorized by law—in a manner in which they had no power to bind the Corporation—then the stipulations in that contract did not bind the defendants for any purpose.

And, once more, there was some evidence bearing on the value of rock excavation in the testimony, showing that one of the proposals offered the performance of that part of the work at five dollars per yard. It may be true, (doubtless it is,) that even this is much more than the fair value; but if so, the defendants were not permitted, on the trial, to prove it. Now, it is obvious, that

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if this rate had been taken as the fair value, the plaintiff would not, upon the basis of a *quantum meruit*, have been entitled to recover any thing. He had, upon this basis, been already overpaid.

We are, therefore, for these reasons, of opinion, that even if any claim, in the nature of an *assumption* for the value of the work, could be sustained, a new trial must be ordered.

The suggestion, that the confirmation of the assessment, laid upon the lands adjacent to the work, amounted to an agreement with the plaintiff, that he should be paid, appears to us unwarranted.

By the terms of the contract, which is held illegal and void, payment to the plaintiff was to be made on the confirmation of the assessment; and, had the contract been valid, such confirmation would have been material as respects him, because the time of payment was thereby made definite.

But, in every other aspect, the act of confirmation was, as respects the plaintiff, a purely *ex parte* proceeding, operating between the Corporation and those whose lands were to be charged, but, in no sense, constituting an agreement with the plaintiff; and, notwithstanding such confirmation, the inquiry, whether the plaintiff is entitled to be paid, is, we think, clearly open to investigation.

The remark of Mr. Justice Strong, in *Brady v. The Mayor, etc., of Brooklyn*, (1 Barb. Rep. 591,) that a resolution to add a sum in question to an assessment, was an acknowledgment of the debt, and a promise to pay it, if recognized at all, must be understood with reference to that particular case. There, a matter in dispute had been informally referred. The persons selected had reported a sum due: the mutual assent of the parties to the amount reported due, amounted to a statement of an account between the parties: the resolutions showed the defendants' assent, and the Court say, that when also assented to by the plaintiff, the claim became valid, however informal the reference and the award thereon.

Aside from the peculiar circumstances of that case, we can see no propriety in calling a confirmation of the assessment an agreement with the plaintiff.

Such confirmation may be evidence that the work was done,

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and that the Corporation accepted it as performance of the contract, and an admission of the amount thereof, and that is all.

The same observations are applicable to the idea, that this confirmation was a valid accord. It has none of the elements of an accord; there was no mutuality; and no consideration gives to it validity in this sense: it is simply, and only a recognition of the plaintiff's right to payment, under his contract. As an admission that the money was payable, it would be material to the plaintiff, as evidence, if, notwithstanding the illegality of the contract, the Corporation had power to bind themselves by mere admissions.

In regard to the argument, that the plaintiff's claim was a disputed claim, which the defendants had power to settle, and that their acts amount to a binding settlement, we observe, first, that the facts, as found by the referee, in this case, lay no foundation for any such proposition. Nothing in the facts, as found, intimates that there was any dispute or controversy on the subject prior to the commencement of this action. They show a confirmation of the assessment, a compliance by the plaintiff with the conditions of the special contract, and a part payment by the defendants of the stipulated price, and that is all.

We find, it is true, in the case, some evidence that the plaintiff's claim was the subject of inquiry and investigation, by a committee of the Common Council; but the finding of facts would not inform the Court, that any thing in the nature of a settlement of a disputed claim had taken place, upon which the plaintiff can rely, if he is not entitled to recover upon other grounds.

Nor, second, do we think the evidence showed such a settlement. The investigation, had before the committee, was, for the information of the defendants, and as a guide to the Common Council, in their action upon the subject, not for the purpose of negotiation, nor did it result in negotiation or arrangement, *inter partes*. Whatever operation the confirmation by the Common Council, after that investigation, may have, as evidence of an acceptance or approval of the work, has been already noticed, and will be hereinafter further considered.

We have thus considered briefly the specific grounds, upon which the plaintiff claims to recover, notwithstanding the illegality of the contract, so far as they are distinguishable from

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the general ground, that the work being performed, accepted and approved by the defendants, they are bound to pay for it, whether there was a valid contract or not.

This ground of claim, we think, is all that arises out of the performance of the work or the acts of the Common Council, in relation thereto; and, if it be sound, then the plaintiff was entitled to payment, either at the contract price, or according to the fair value of the work.

Before noticing further this general ground of claim, it is proper that we should say, that we concur fully with the referee in his conclusion, that the contract itself was illegal and void, and that the plaintiff could not, by virtue of the contract, recover the stipulated price for rock excavation.

And it is material to notice, that the invalidity of the contract results from the want of power to make a contract in the manner this was made, for the purposes for which it was made.

It was entirely competent to prescribe, in the charter of the city, the mode in which, and in which alone, contracts should be made. When the powers of a corporation are limited in the charter, the acts of its officers and agents, beyond the scope of those powers, do not bind the corporation. And when the mode, in which the powers of a corporation may be exercised, is specially restricted, the officers and agents may not bind the corporation in any other manner. As Welles, J., in *The Farmers' Loan and Trust Company v. Carroll*, (5 Barb. Rep. 649,) says: "Where a corporation relies upon a grant of power from the Legislature to do an act, it is as much restricted to the mode prescribed by the statute for its exercise, as to the thing allowed to be done."

Those who deal with a corporation, whose mode of dealing is prescribed in their charter, must take notice of such prescription, at their peril. In this case, the contract in question was not given to the lowest bidder.

The officers of the Corporation did not take proposals from those who offered to perform the work in a form in which it was possible to determine who was the lowest bidder.

The plaintiff, not only was bound to know this, but he had actual knowledge, that neither the invitation for bids, nor his offer connected therewith, could enable any one to say, who was the lowest bidder.

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The case is not one, in which all the proper elements have been taken into view, in considering whose bid was the lowest, and in which the erroneous determination, by which the work was awarded to the plaintiff, resulted from unforeseen circumstances developed in the progress of the work; as where, notwithstanding estimates made in good faith, the amounts or quantities were found more or less than the estimates. But it is a case, in which the great bulk of the work was laid entirely out of view, and the bids tested by what has proved a small portion of the labor stipulated for, when the residue of the work was deliberately, expressly and designedly excluded from the comparison.

Not only was the statute provision of the charter violated, but the general ordinances of the city were disregarded.

We feel no hesitation in concurring that a contract, so made in violation of the charter, and of the general ordinances, was illegal and void, and imposed no obligation on the Corporation of any kind in respect to its stipulations, whether as to price or other terms or conditions thereof.

We also observe, on the subject generally, that the Corporation of the city, in the matter of contracts of this description, are acting not simply as individual acts, in respect to his private interests, nor as a private corporation acts in relation to its property or concerns. They derive no property, and gain no corporate benefit from the improvement of streets or other public work. And whatever they may pay or contribute toward the expenses, (by reason of the great cost of the improvement, assessed upon the city at large,) they pay out of the public treasury, from moneys raised by taxation for public purposes.

They act as a public corporation in discharge of duties, and in the exercise of powers which they hold, as trusts, for the benefit not of the Corporation as such, but for the citizens at large and for the public.

Not only so, they are trustees and agents in another sense; the exercise of their powers, in matters such as are included in this contract, proceeds upon the assumption of benefit to contiguous landowners, to be secured through the agency of the Corporation, not at their own cost, but at the landowners' expense. And that agency involves, further, the creation of a lien upon the lands,

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and the enforcement of the rights of the landowners bound to contribute, as between themselves.

So that the defendants, as a private corporation, may be said to have no interest in the subject, but to act throughout as trustees and agents of the public and the landowners; and to be clothed with the requisite powers, only, for the benefit of such owners and the public.

Danger of abuses, under such circumstances, is to be regarded as the reason and ground of the restriction, which requires that contracts for work, etc., shall be given to the lowest bidder; to the end that the tax-payers, or those charged with the expenses, may not be unjustly or unduly burthened, while the benefits contemplated by the proposed contracts may be secured.

The question then recurs: Are the defendants liable for work done, the contract therefor being illegal and void, because entered into in violation of the charter? And this question remains to be discussed in two aspects, in the present case. Are they liable to the plaintiff, as upon a *quantum meruit*, because the work has been performed and is accepted? And have the Common Council power to waive the original defect in the plaintiff's claim, and by their action affirm his title to recover, so as to give him a right of action, notwithstanding the requirements of the charter have not been complied with?

The answers to these questions seem to us inevitable, and too obvious to allow of extended discussion. If either be answered affirmatively, the restrictions in the charter become practically null, and the officers and agents, through whom alone the Corporation can act, may disregard the statute, and in practice repeal it. This, to our minds, is the prominent objection to the plaintiff's claim, and laying out of view every other objection above suggested to the recovery in this case, (except so far as they are connected with this consideration,) it seems to us fatal to the plaintiff's case.

The Corporation can only act through its chosen officers and agents.

If those agents not only may pay for work and labor actually done without a compliance with the statute requisites, but are legally bound to such payment, then no contract is necessary, and the restrictions in the statute are a dead letter.

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If those agents may dispense with a contract, then, and then only, can they confirm an illegal and void contract, and then, also, by an acceptance of the work and a confirmation of the contract by resolution, they repeal the statute *pro hac vice*.

The relation which the Corporation and its officers bear to the subject; the duties they owe to the public, and those upon whom the burthen is to fall, and the nature of the powers they possess, forbid us to concede any such force to their acts. By the charter the power is limited, and it is a familiar rule that corporations can only bind themselves by contracts they are expressly or impliedly authorized to make.

It may sometimes seem a hardship upon a contractor, that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.

The analogy, drawn from the obligation of an individual to pay for work which he accepts, although there has been no previous contract for its performance, wholly fails to reach the present case. Here, neither the officers of the Corporation, nor the Corporation, by any of the agencies through which they act, have any power to create the obligation to pay for the work, except in the mode which is expressly prescribed in the charter; and the law never implies an obligation to do that which it forbids the party to agree to do.

And, for the like reason, the defendants cannot be treated as ratifying the unauthorized acts of its agents. The difficulty lies not merely in the want of original power in the agents to make the contract, but in the want of power in the Corporation itself to make the contract otherwise than in the mode prescribed by the charter. An individual, having power to make a contract, may ratify or affirm it, when made by one who, without authority, assumes to be his agent, but if the individual have himself no such power, he can no more bind himself, retro-actively, to its perform-

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ance, by affirmation or ratification, than he could have done so prospectively, in the first instance. The power to ratify *ex vi termini* implies a power to have made the contract, and the power to ratify in a particular mode, implies a power to have made the contract in that manner.

An express resolution directing the plaintiff to perform the work would not have been valid or have bound the defendants, and a resolution, in very terms, ratifying what is done by the officers of the Corporation in violation of the charter, can have no greater effect. (*Boon v. The City of Utica*, 2 Barb. R. 104; *Blood v. Goodrich*, 12 Wend. R. 525; *Hodges v. The City of Buffalo*, 2 Denio R. 110; *McCullough v. Moss*, 5 Denio R. 567.)

We have considered the case without noticing a further ground of objection to the validity of the plaintiff's contract, and what was done in relation thereto, viz., that the general ordinances of the city were violated in making the contract, and that the subsequent acts of the Common Council in a particular case cannot be regarded as giving validity to an act in violation of those ordinances, and that those ordinances as effectually exclude the idea of a valid ratification of what was illegally done as if they were incorporated in the charter. In placing our opinion upon the grounds above stated, we do not design to express any opinion upon this ground of objection.

The case of *Russ v. The Mayor*, etc., (December Special Term, 1853,) and also the cases of *Smith v. The Mayor*, etc., (4 Sandford Rep. 221,) and *Christopher, et al. v. The Mayor*, etc., (13 Barbour Rep. 567,) may be profitably consulted in reference to the whole subject.

We are constrained to say that the judgment herein must be reversed, and a new trial ordered. Costs to abide the event.

Ordered accordingly.

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JAMES L. PORTER v. WM. LOBACH and JOHN F. SCHEPELER.

A firm is not liable for money, lent on the application of a person employed by them, without their knowledge or authority, and used by him for his own purposes, when there is no evidence that the loan was solicited in the firm's name, or for its use, although at the time of the loan he was interested, in a particular department of their business, in the profits and losses of sales made to customers that he might procure and induce to purchase; especially when there is no evidence that he was held out as a partner, or was known, or supposed, to be interested as such in any of the business of such particular department. And although the lenders, (having dealings with such firm,) render an account, say in January, 1851, to such firm, charging that firm with the money so lent, in this form: "our loan to Mr. Tripler, \$1186.40;" and although the account is retained some six months, yet if no act has been done directly or indirectly affirming its accuracy, but, on the contrary, its accuracy was disputed in the following March and August, and when last disputed, the firm was requested, by the lenders, to allow the account to stand as it was until the return of such borrower from Europe, such account cannot be treated as a stated and settled account which such firm is not at liberty to dispute.

A verdict should not be taken at the trial, for the plaintiff, subject to the opinion of the Court on the whole evidence, with a view to its decision of disputed questions of fact. But when that is done, and the Court at General Term, at the instance of counsel, hear the case on its merits, they will disregard the objection that a particular and material fact is unproved, when such objection was not taken at the trial, and some evidence in support of it was given, and the whole proceedings tend to show that it was understood at the trial that no such objection was relied on.

(Before Bosworth and Horrman, J.J.)

Heard Nov. 13; decided Nov. 28, 1857.

THIS action comes before the Court, on a verdict taken subject to its opinion at General Term, with power to the Court to render a judgment for such amount as it may deem the plaintiff entitled to, or to set aside the verdict, and order a dismissal of the complaint, or a judgment for the defendant. Either party to be at liberty to turn the case into a bill of exceptions. The verdict was taken, in form, in favor of the plaintiff, for \$2000, being a larger amount than he claims to be entitled to recover.

The plaintiff sues as assignee of William Burger & Co., to recover a balance alleged to be due from the defendants, as partners, to Wm. Burger & Co., which demand the plaintiff has purchased.

The claim bought by, and assigned to, the plaintiff, as restricted

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by stipulations made at the trial, consists of two items of debit, made by Wm. Burger & Co., to the defendants, viz.:—

July 16, 1850, amount of draft on one Pablo Nigron, \$338.16
31 Dec., 1850, proceeds of sale of goods, per "Fredonia," 1104.18

Total, \$1442.34

The defendants' answer states, in substance, that, prior to the alleged sale and assignment to the plaintiff, (which was on the 30th of March, 1854,) the defendants had various mercantile transactions with Wm. Burger & Co., other than those referred to in the complaint, and that, as the result of the whole dealings, the latter firm, on the 1st of January, 1851, was a creditor of the defendants, to an amount not exceeding \$800.20, to which sum, it is insisted, the recovery must be limited. It also alleges, that on or about the 1st of January, 1851, the defendants rendered an account current to Wm. Burger & Co., of all the said transactions between the two firms, showing the balance due from the defendants to Wm. Burger & Co. to be \$300.20. That this account was retained more than six months without any objection made thereto, whereby the said account became, and was "admitted, settled, and allowed."

So much of the answer as set up a claim against Wm. Burger & Co., to be credited with enough to reduce their account to \$300.20, was put at issue by a reply.

The defendants having moved for a reference, the plaintiff, as a condition to the refusing of the motion, stipulated to admit the correctness of the account which had been rendered by the defendants, except two items on the debit side thereof, being—

"1850.—June 8. Our loan to Mr. Tripler, \$1136.40
" Sept. 16. One Spanish cloak, sold
by Mr. Lobach, 106.112—106.00."

That stipulation, by its terms, declared, that it was not to prejudice the defendants' right to insist that any of the credits in said account were properly credits against the two disputed items, if those two items should be disallowed to the defendants on the trial. The objection to those two items was, that if they were

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ever had by any person, they were had by a Mr. Tripler, on his own account, and not on account of the firm of William Burger & Co., and that the said firm are in no way chargeable therefor.

The account, which is admitted to be accurate, (except as to the above two items,) commences under date of the 7th of February, 1850, and the last item of debit to Wm. Burger & Co., except interest, and some charges on the business transacted for them, is December 2, 1850. The last item of credit, except interest, is December 20, 1850. The account is dated the 31st of December, 1850, and credits to Wm. Burger & Co., in the aggregate, \$7077.39 and debits them, in the aggregate, with 6777.19

showing a balance due Wm. Burger & Co., of \$300.20

It appeared on the trial that the book-keeper of Wm. Burger & Co. had three interviews with the defendants, in relation to this account, in which the two items now in dispute were objected to, and the subjects of conversation. The first was in March, and the last in August, 1851. At the last interview, the defendants gave such book-keeper a check for \$600, on another account between the parties, and asked him to let the account in question "stand over as it was, until they could see Mr. Tripler."

The only evidence of any importance bearing upon the question, whether the \$1136.40 was lent, and the cloak sold to Wm. Burger & Co., on the credit of that firm, or to Tripler alone, and on his credit, except such as is furnished by the account rendered, consists of the testimony of Tripler, who was examined on commission.

The evidence of Tripler tends to show, that, during the year 1850, the firm of William Burger & Co. consisted of said Burger, and Geo. R. Hendrickson, and John E. Hall. That, in addition to other business, which may, or may not have been its principal business, the firm, so far as the evidence discloses, transacted a business spoken of as the wholesale drug and commission business, and which was designated among the members of the firm as the "Spanish Business." It was the particular duty and employment of Tripler to attend to that.

Tripler was to have twenty-five per cent. of the net profits of so much of that branch of the business as he might procure for the firm, and was to bear the like proportion of its losses.

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He was to be at liberty to draw at the rate of \$1200 per annum, to cover his expenses, and the residue was to be retained by the firm, to meet his share of the losses, arising from the aforesaid part of the Spanish business.

He applied to the defendants on the 8th of June, 1850, for a loan of \$1136.40, and received their check for that amount, and also delivered to them \$600, in money, or a check for that amount.

The money borrowed he applied to his own use, and borrowed it without the knowledge of any member of the firm of William Burger & Co., and without any direct authority from them to do so.

He did not state to the defendants for what purpose he required the money, nor did they ask him.

The Spanish cloak was ordered by him, and was designed for his personal use, and was so used. He gave no instructions to the defendants to whom they should charge it.

The check, which the defendants gave to Tripler for the \$1136.40, was not produced on the trial.

John C. Dimmick, for plaintiff.

J. Larocque, for defendants.

BY THE COURT. BOSWORTH, J.—This action should not have been concluded, at the trial, by taking a verdict on the whole evidence, for the plaintiff, subject to the opinion of the Court at General Term, unless there are no material portions of it which conflict with each other, and the whole leaves no doubt, as to the facts established by it.

But, having heard the cause argued at length, on the case made, we shall proceed to dispose of it, in accordance with our views of the effect of the evidence given at the trial:—

It is obvious that Tripler was not a member of the firm of William Burger & Co., either as between himself and the persons composing it, or as to third persons.

It is not pretended that he held the relations, or had the rights of a partner, except as to the department of that firms' business, called the "Spanish Business."

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And his interest in that department was limited to such business as he "might introduce and procure to the said firm."

There is no just ground for pretending, that he was held out to the world, as having, or was supposed by the defendants, to have any interest, in any part of the business of that department, or to be a partner in the firm of William Burger & Co.

It is clear, that the money borrowed was not applied to the use of the firm of William Burger & Co. There is no evidence that an application for the loan was made in the name of that firm, or that the defendants supposed, at the time, that it was solicited in behalf of that firm, or for its benefit.

The check lent was not produced at the trial, so as to show that it was not drawn to the order of Tripler. The charge, in the account rendered, is, in terms, "our loan to Mr. Tripler."

The terms of this charge do not import a loan to the firm, or on its credit.

It is undoubtedly true, that if money is borrowed by one partner, in the name of the firm, in a manner and under circumstances justifying the lender in trusting to its credit, the firm will be liable, although the borrowing partner may apply it to his own use.

So when he borrows, without disclosing whether he borrows on his own account or that of the firm, and applies it to the use of the firm.

But when he borrows, without applying for the loan either in the name of the firm, or for its use, and applies the money to his individual purposes, and the loan is made by a check of the lender, and there is no proof that such check was not payable to the order of the borrowing partner, and there is no evidence that the loan was, at the time, charged to the firm, and the account, when rendered, describes that transaction as a loan to the person borrowing, the conclusion that the loan was solicited for the firm or made on its credit, is not warranted by such facts alone. (*Jacques v. Marquand*, 6 Cowen, 497; *Church v. Sparrow & Goodsell*, 5 Wend. 223; *Whitaker v. Brown*, 16 Wend. 505; *Miller, et al. v. Manice*, 6 Hill, 114, 119; Parsons on Mer. Law, 178 and 179, and note 7.)

If the question were to be submitted to a jury whether the money was borrowed in the name of the firm, or loaned by the

defendants in an honest belief that it was desired for the firm's use, it would be their duty, on the evidence before us, to find that it was not.

Tripler's answer to the 18th cross-interrogatory is not very full. He was asked, "whether the said loan was not made by you, from the defendants, on your own account, and for your own individual use and purposes," etc. He answers, "I have already stated that the amount was received by me in the form of a check, and the same applied to my own use."

To the fourth direct interrogatory, he says, "I do not think there was any particular mention made on whose account the money was loaned," and in answer to the 22d cross-interrogatory, he says, "I never gave to Messrs. Lobach & Schepeler any instructions, nor did they ever ask me for any, as to whom the money received by me, at this time, was to be charged."

He says the Spanish cloak was ordered by him in the winter of 1849. It is charged in the account rendered, under the date of September, 16th, 1850.

No presumption can be indulged that a cloak, ordered by a person, who was only known to be employed by a firm, and not known to be interested as a partner in any of its business, and who, in fact, on the most unfavorable view for the plaintiffs, was interested as such in a part of it only, bought it for the firm, or that it was sold on its credit.

The fact, that the defendants had dealings with Tripler, which must be presumed, on the evidence before us, to have been understood to have been had with him, individually, and on his personal credit alone, does not add to the strength of the defendants' claim, as presented by the other evidence, to have the lent money treated as a loan to the firm of Wm. Burger & Co.

We think the two disputed items of debit must be rejected; and as the \$600, credited on the 8th of June, was a part of the transaction, out of which the loan arose, that it should be allowed as a credit against the loan. The difference between that item of credit and the aggregate of the two disputed items, being \$642.40 Should be added to the balance of the account, as ren-

**And the plaintiff should have judgment, for \$942.60
B.—II. 18**

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and interest, unless the account, as rendered, is to be deemed a stated account, so as to conclude the parties, from questioning its accuracy.

There is no pretence for saying, that Wm. Burger & Co. gave any actual assent to the correctness of the account rendered. It is sought to conclude them, and the plaintiff, as their assignee, by the account, as if it had been actually settled and agreed to, on the ground, that Wm. Burger & Co. kept it, during a reasonable time, to examine it and object to it, and suffered such reasonable time to elapse, without making any objection to its accuracy. In *Lockwood v. Thorne*, (1 Kern. 170,) the plaintiffs, after receiving from the defendants an account, showing a balance due to the former, immediately drew for the amount of such balance, which was paid. No objection was made to the correctness of the account, until that action was brought, a period of about nine months. In *Toland v. Sprague*, (12 Peters, 300-334,) the party to whom the account was rendered, showing a balance in his favor, demanded such balance.

In the case before us, there was no act of Wm. Burger & Co., directly or indirectly, affirming the correctness of the account.

On the contrary, as early as in the following March, and subsequently, as late as in the subsequent August, they disputed the accuracy of the account. There can be no pretence, that Wm. Burger & Co. had either ordered, or enjoyed the benefit of, either of those items. And, as we view the evidence, the conclusion is inadmissible, that the defendants believed, at the time, that either of them was furnished to that firm, or that they parted with either of them on its credit. The defendants did not claim, when objection was made to the accuracy of the accounts, that it was too late to take that ground, or that the account was to be treated as a stated and settled account; but, on the contrary, requested that it might be allowed to stand as it was, until the return of Tripler from Europe.

Under such circumstances, we do not think that Wm. Burger & Co. can be held, to have acquiesced in the account, so as to be bound by it, as a stated and settled account.

A supplemental point was made, during the argument, that the action would not lie, because no demand of payment, prior to the commencement of the suit, was alleged or proved. The com-

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plaint states that the defendants had received the moneys sought to be recovered, and that they were due and owing from the defendants, and that a payment of some moneys, on account, had been made, and claims the balance. Under the issues made, proof of such a demand, if deemed material, would have been admitted.

The evidence of Russell, as to the interviews with the defendants, in respect to the account in question, and as to the payment, by the defendants, at the last interview, of the balance due to Burger & Co., on another account, and the defendants' request that the account in question might "stand over as it was until they could see Mr. Tripler," are sufficient evidence of a demand, when it is considered that the objection, that a demand of payment had not been made before suit brought, was not taken at the trial.

It is quite obvious, as we think, that the trial was conducted on the theory, that the only question was, whether the defendants should be allowed the two disputed items, as charges justly made against the firm of Wm. Burger & Co. And it is equally clear, that if the objection, now raised, had been started at the trial, Russell might have proved that he insisted the defendants should pay the balance which would be due, on striking out these items.

We think the plaintiff should have judgment on the verdict for \$942.60, with interest from the 31st of March, 1851.

Judgment accordingly.

THE ATLANTIC MUT. INS. CO. v. BIRD & NEILSON.

A pro-rate freight is due, only, when the owner of the goods elects to receive them at an intermediate port, and this election can only be made, when the master is able and willing to transport them to their place of destination.

When the vessel is wholly disabled during the voyage, and no effort or offer is made by the master or shipowner to save the goods and forward them to their port of destination, their acceptance, by their owner, is compulsory, and no freight is demandable.

Freight cannot be recovered upon the original contract, because it has not been performed, nor upon an implied contract, if the goods are accepted from the necessity of the case, and because the master and shipowner have ceased to make any efforts for their preservation; because, under such circumstances, the owner only takes up his own goods on finding them abandoned.

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An insurance company that insured the goods, and that has paid a total loss, on an abandonment by the owner and assured, having contracted with a third person to forward the goods to the port of destination, for fifty per cent. of their net proceeds, who did so forward them, is entitled to recover half of such net proceeds, notwithstanding the shipowner, after such contract is made, claims freight on the part so saved, and directs such third person to retain such freight, or pay it to the shipowner's agent.

(Before Bosworth and Howman, J. J.)

Heard, November 6th, and decided December 5th, 1857.

THE Atlantic Mutual Insurance Company are the plaintiffs in this action, and William H. Bird and John Neilson are the defendants. It comes before the Court at General Term, on a case agreed upon by the parties, under and pursuant to § 372 of the Code, which case reads as follows, viz.:—

“Statement of Facts, on submission of controversy, pursuant to Section 372 of the Code of Procedure.

“Giffard & Sambour, of Gondives, shipped on board the brig Emeline 404,000 pounds of logwood, and consigned same to Henry Delafield & Co., of New York City, the owners thereof.

“BILL OF LADING AS FOLLOWS:

“Shipped in good order and condition by Giffard & Sambour, of Gondives, upon the good ship or vessel Emeline, whereof, Bradbury Farnham is master, for this present voyage, and now riding at anchor in the Port of Gondives, and bound for New York, U. S., four hundred and four thousand pounds of logwood numbered as per margin, and are to be delivered in like good order and condition at the aforesaid Port of New York, all and every the dangers and accidents of the seas and navigation of whatever nature and kind excepted, unto Messrs. Henry Delafield & Co., or their assigns, he or they paying freight for the said goods as per charter party.

“In witness whereof, the master or purser of said ship or vessel hath affirmed five bills of lading, all of this tenor and date, one of which being accomplished, the other four to stand void.

“Dated in Gondives, this twelfth day of December, 1856.

(Signed)

BRADBURY FARNHAM.

“The freight on said logwood was to be five and one-half

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dollars per ton, on its safe delivery in New York City, by said Farnham.

"Bradbury Farnham, the captain, was one of the principal owners of said brig, the other owners were unknown to the plaintiffs, although they made diligent inquiry for them.

"Henry Delafield & Co. insured the logwood with the plaintiffs on the day of December, 1856, for the sum of \$3494.

"The brig Emeline was wrecked, on or about the 18th day of January, 1857, on Wardell's Beach, about 35 miles from New York City, her port of destination, and part of her cargo cast ashore. She went entirely to pieces, so that she could not then be identified, and all hands on board were lost.

"On the 27th day of January, 1857, the Sun Mutual Insurance Company, believing the logwood insured by them, entered into the following contract:

"New York, January 27th, 1857.

"The undersigned hereby agree to deliver the cargo, that has been or will be saved from the brig Emeline, (lately wrecked on Wardell's Beach, New Jersey,) in New York for fifty per cent. of the net proceeds of the said cargo, they (meaning Woolley) to bear all the expenses that have been or will be incurred in so doing.

"Witness—JOHN NEILSON.

(Signed.)

JORDAN WOOLLEY."

Before this contract was made, the logwood had been piled on the beach by the agent of the Board of Underwriters.

Under this contract, Woolley took possession of the logwood, sent it to New York, and consigned the same to the defendants, who received the same, by order of the Sun Mutual Insurance Company, the supposed owner. On its arrival, on or about March 21st, 1857, the said defendants took possession of, and sold the same, and received the money. Previously to this, and sometime during the month of February, 1857, the other owners of the brig, (Farnham being dead,) notified the defendants that the net freight-money on the logwood saved should be paid to Joseph Perkins, of New York, their agent; and that they were willing to pay fifty per cent. salvage on the same.

Nothing further was done by the owners of the brig.

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The defendants sold the logwood for \$1841.90, and received the money.

On or about the 21st day of March, the plaintiffs ascertained that the logwood was insured by them. Henry Delafield & Co. duly abandoned the same to plaintiffs, who accepted the abandonment, and paid a total loss on the logwood.

The defendants, upon being apprised of the ownership of the plaintiffs, acknowledged the same, and stated to them the terms of the contract made with the Sun Mutual Insurance Company, to which contract the plaintiffs assented.

The plaintiffs were entirely ignorant, at that time, of any claim for freight, or any arrangement concerning it.

The defendants received, from sale of the logwood, \$1841 $\frac{9}{100}$; they paid for Custom House fees and ordinary charges \$110 $\frac{4}{100}$; leaving a balance in their hands of \$1731.27.

The plaintiffs demanded from defendants fifty per cent. of this last sum, or \$865.64.

The defendants alleged, that freight was due on 120 tons, 17 cwt., 2 qrs., 12 lbs., at the rate of five and a half dollars per ton, amounting to \$664.85.

The defendants deduct this sum from	\$1731.27
Deduct	664.85

Leaving a balance of 1066.42

The defendants offer to pay the plaintiffs fifty per cent. of this sum, or \$533.21.

The plaintiffs deny that any freight money was earned, under the facts, and demand, from the defendants, \$865.64.

The question for the Court is, whether any freight was earned, and what judgment must be given on the facts.

T. Scudder, for plaintiffs.

I—1. The contract between the shipper of the goods and ship-owner was, that the latter should receive his freight money, on the safe delivery of the goods, in like good order and condition, at the port of New York. Such delivery, therefore, was a condition on which depended the right of the shipowner to the payment of his freight, and means the delivery of the entire cargo. (*Davidson v.*

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Gwynne, 12 East. 381; *Edwards v. Tbdd*, 1 Scammon, 463; *Dunnett v. Tomhagan*, 3 Johns. 154; *Phelps v. Williamson*, 5 Sandf. 578.) 2. The goods were never delivered by the shipowner, but the contract was broken by his default. Freight money was thereby forfeited.

II.—1. The vessel was totally lost, so that the owners thereof could only earn their freight money by hiring another vessel, and sending the goods to their port of destination. (*Kimbal v. Tucker*, 10 Mass. 195.) 2. It nowhere appears that any other vessel was hired, or any act done, by the shipowners, toward sending the goods to their port of destination.

III.—1. The contract, entered into with the Sun Mutual Insurance Co., and under which the defendants received the logwood and sold it, was not a contract for salvage; it was a simple contract, to bring goods, then safe, (for they had been piled on the beach,) from one place to another. (Abbott on Shipping, p. 659.) 2. The defendants are liable to the plaintiffs, having received the money for goods acknowledged by them to belong to the plaintiff. (*Bates v. Stanton*, 1 Duer, 79.) The defendants have no lien on the goods.

IV.—1. Where goods are, compulsorily, thrown upon the owner, short of the port of destination, no freight is earned. (*Smith v. Wilson*, 8 East. 437; *Hustin v. Union Ins. Co.*, 1 Wash. Cir. R. 530; *Callendar v. Ins. Co. of N. A.*, 5 Binn. 525; Abbott on Shipping, p. 525, n. 1.) If, within a reasonable time, the shipowner fail to come forward and send the goods to their port of destination, this should be evidence of his intention to abandon his freight money.

V.—1. If goods are brought to their port of destination safely, by agency other than that of the shipowner, after they have been abandoned by him, no freight money is earned. (*Dunnett v. Tomhagen*, 3 Johns. 154.) 2. There was no voluntary acceptance of the goods by the plaintiffs short of the port of destination, and no freight money was earned. (*Barker v. Cheviot*, 2 Johns. 352; *Scott v. Libby*, 2 Johns. 386; *Phelps v. Williamson*, 5 Sandf. 578; *Marine Insurance Co. v. Mutual Insurance Co.*, 9 Johns. 186.) The plaintiffs should have judgment for \$865¹⁴, with interest and cost.

James C. Carter, for the defendants.

Before proceeding to a statement of the particular questions which arise upon the agreed case, and of the defendants' view of the law thereon, it is deemed important to lay down some of the well-established principles of commercial law respecting freight, and when, and to what extent, it is earned.

If the contract of the shipowner be discharged by the carriage of the goods to the port of destination, whether this be done by the shipowner or his agent, full freight is earned.

If the vessel be wrecked or disabled at a place short of the port of destination, it is the right and duty of the shipowner, and of the captain as his agent, either to repair and refit the same ship, or to procure a new one, and thus to forward the goods to the port of destination. And for these purposes, of course, the shipowner has the right to retain the goods in his custody for a reasonable time.

If the owner of the goods, therefore, insist upon taking possession of them at a place short of the port of destination without the assent of the shipowner, or of the master as his agent, who insists upon performing the contract, the owner of the goods must pay full freight.

But if the owner of the goods desires to receive them at a place short of the port of destination, and the shipowner or master assent to it, then a *pro-rata* freight only is earned.

It is believed, that thus much is so well settled to be the law, as scarcely to require a citation of authorities. The following, however, may be consulted. (*Luke v. Lyde*, 2 Burr, 882; *Williams v. Smith*, 2 Caines', 21, per Thompson, J.; *Robinson v. Marine Insurance Co.*, 2 John. 323; *Smith v. Wright*, 15 Barb. 51.)

I. In bringing the logwood from the place of shipwreck to the City of New York, the port of destination, Jordan Woolley acted in one of four capacities. First. As the agent of the owners of the brig; or, secondly, as the agent of the owners of the cargo; or, thirdly, as the agent of both these parties; or, fourthly, as a salvor, under a contract with one or both the interests (those of freight and cargo) to receive a certain compensation in place of what the maritime law would have allowed to him.

II. If he acted in the first capacity, it follows that the shipowner brought the cargo to the port of destination, and full freight is earned. That he did act in this capacity, is evidenced

by the fact that the shipowner gave notice to the defendants, (who were acting under Woolley and as his agent,) that he looked to them for his freight. This was a direct interposition, on the part of the shipowner, while he had a right to interpose, and an authority to Woolley to carry the cargo to New York, on certain terms. The silence of the defendants implies and constitutes an assent to the terms. But for this assent, the shipowner might, and probably would have taken the cargo into his own hands. The reasonable time for his doing so had not elapsed.

III. If Woolley acted as the agent of the owners of the cargo, or of those to whom they had abandoned, which is the same thing, then the case stands thus: A vessel is shipwrecked, and the captain and all hands lost, leaving no agent of the shipowner present. The cargo is of such a nature, and in such a condition, as to be in no danger of loss or damage. Under these circumstances, the owner of the cargo takes possession of it, without giving notice to the shipowner, or calling upon him to complete his contract, by carrying the goods to the port of destination, and without even his knowledge. Such a taking, is clearly a taking of the cargo without the assent of the shipowner, short of the port of destination, and, of course, full freight is due. 1. Should it be deemed that the subsequent notice of the shipowner, to the defendants, to pay freight to him, was equivalent to an original assent on his part to the taking, the case then becomes one of a voluntary acceptance of the cargo, by the owner, at a place short of the port of destination, and a *pro-rata* freight is due. (See authorities above cited.) 2. It cannot be maintained that the acceptance of the cargo, under these circumstances, was involuntary. An acceptance cannot be involuntary, unless there is no alternative. To give it this character, it must appear, either that the carrier or his agent was present and declined to carry the cargo on, or that it was manifestly out of his power to do so; or that he was absent, and notice was given him to complete his contract, which he had failed to answer; or that he was absent, and the cargo was in such a perilous condition that no time for notice could be spared. Neither of these conditions existed in the present case.

IV. If Woolley acted in the third of the above-mentioned capacities, *i. e.*, as the agent of both parties, full, or at all events,

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pro rata freight was earned. 1. This agency for the owners of the cargo was prior to his agency for the carrier, and, as has been shown under the third point, the shipowner's right to freight, whether full or *pro rata*, had not been divested at the time when the agency for the shipowner commenced. Under these circumstances, the agreement, if such there was, of Woolley with the shipowner, in respect to the freight, could in no manner prejudice the owners of the cargo. 2. But as the shipowner interposed while he had a right to interpose, as has been shown under the second point, and brought the freight to the port of destination, through his agent Woolley, his right to full freight cannot be impaired by the fact that Woolley also acted as the agent of the owners of the cargo.

V. If Woolley acted in the last of the above mentioned capacities, *i. e.*, as a *salvor*, under a special agreement with both parties in interest, *full* freight is earned. 1. It is entirely competent for a salvor to agree with one interest, that he will accept a specified compensation for his services. The effect would be, that the Court of Admiralty, instead of allowing him a compensation to be fixed by the Court, would award, as against the interest in question, the sum agreed upon; and if he can make this agreement with one interest, he may do the same thing with all. 2. We claim it as a principle of plain equity, that when a salvor brings cargo to the port of destination, freight is due to the shipowner from the owner of the cargo, if the owner accepts the goods. (*Post v. Robertson*, 1 John. 24.) 3. In such a case the value of the goods is increased by the amount of the freight, and it is utterly immaterial to the owner of the cargo by whom the contract of carriage is performed. 5. To permit the owner of the goods, under such circumstances, to obtain them, free from the payment of freight, would be to throw the entire burden of a peril of the sea, which ought to be shared in common, upon one of the parties. 6. This view of the case is supported by eminent authority. The case of *Luke v. Lyde*, before cited, is directly in point, and has steadily been recognized as a reliable authority, notwithstanding what was said of it by Livingston, J., in *Post v. Robertson*, (1 John. 24.) This latter case, nearly identical in its circumstances with the one at bar, in the aspect in which it is now being discussed, also contains a deliberate recognition of the principle now con-

tended for. Thompson, J., in delivering judgment in this case, and with whom Kent, C. J., Spencer and Tompkins J. J., concurred, said, "I am inclined to think that the plaintiffs are entitled to recover some freight, and that this ought to be 'in proportion to the amount of goods received; because the right to freight arises altogether from the acceptance, which causes an implied promise to pay. This was the rule adopted in the case of *Luke v. Lyde*. Nor can any thing be more consonant to principles of justice and equity.'" The action failed in this instance, as in *Cook v. Jennings*, (7 D & E. Rep., 381,) because it was covenant on the charter party. It should have been *assumpsit*, on the implied promise. 7. If any should claim that the general rule were otherwise, still no one could reasonably insist that an exception ought not to be raised in cases, like the present, where the goods have been delivered at the port of destination in an entirely unharmed condition.

VI. Judgment should be for the plaintiffs for the sum of \$588. 27 only; or, should the Court be of opinion that *pro rata* freight only was earned, then, for a small additional sum to be ascertained by reference, unless agreed upon.

BY THE COURT. BOSWORTH, J.—According to the facts stated in the case, the defendants had no agency in forwarding the logwood to New York. That was done by Woolley, and the defendants were his consignees and agents to receive and sell it. There was no communication between Woolley and the owners of the brig. It cannot be said, therefore, that Woolley was in any respect their agent.

The case, then, is reduced to a narrow compass. A vessel is wrecked, within thirty-five miles of her port of destination, a part of her cargo is washed ashore and piled on the beach, and all hands on board are lost. The owner and consignee of the cargo abandon it to the underwriters. The latter, on diligent inquiry, cannot discover any owner of the brig, and no owner, or part owner, nor any one in their behalf, presents himself either to protect the cargo, or to forward it to its port of destination.

Under such circumstances, the underwriters take charge of it, by contracting with a third person to deliver the cargo saved, at its port of original destination, at a specific compensation agreed

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upon between them. Under that contract it is so forwarded and sold.

If the shipowner is entitled to freight in such a case, then he is entitled to freight in all cases, in which his vessel is disabled during her voyage, by the perils of the seas, from completing it, provided the cargo, or any part of it, ultimately reaches its port of destination through the intervention of its owners, although the carriers, from the moment of the wreck, give no care, either to the preservation of the cargo, or to forwarding it to the place at which their contract, as a condition to the right to demand any freight, required them to deliver it.

Such an intervention of the owners, at an intermediate point in the voyage, to secure so much of the cargo as they could save, cannot be said, justly, to be a voluntary acceptance of the cargo, at the place of the wreck.

There was no election to be made, except between the two alternatives of losing the whole, or saving, by their unaided efforts, such portion of the cargo as might be secured from the perils, to which the shipowner, for all practical purposes, had abandoned it.

There certainly was no acceptance, voluntary or otherwise, of the cargo, at the intermediate point, by the original consignees and owners. They abandoned to the plaintiffs, their insurers. It would be a very forced construction to hold, that the efforts of the latter to save a part of the cargo, after they had paid, or had become liable to pay, a total loss, when it is considered that those efforts were made after a failure, upon diligent inquiry, to discover any owner of the vessel, and apparently after a total abandonment, by the shipowner, of the voyage, raise an implied promise to pay freight, because those efforts have resulted in conveying some of the cargo to the port of destination, and placing its proceeds in their possession.

Under such a state of facts, these proceeds belonged to them, as insurers of the cargo, after paying a total loss, and there was no lien for freight attached to that cargo. (*Mar. Ins. Co. v. Unit. Ins. Co.* 9 J. R. 186-191; *Dunnett v. Tomhagen*, 3 J. R. 154; *Welch v. Hicks*, 6 Cow. 504.)

In *Dunnett v. Tomhagen*, the Court say: "no freight was earned on the homeward voyage, because no part of the cargo was delivered by the ship." In the case before us, no part of the cargo

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was delivered by the ship, or by any one acting in behalf of the master or shipowner, but it was delivered through the efforts of the underwriters, to whom it had been abandoned, and who were compelled, by necessity, to save what they could, or submit to a total loss.

The leading cases on this subject are examined in Abbott on Shipping, 5 Amer. Edition, 547, note 1; and in Angell on the Law of Carriers, § 399 to 414 inclusive.)

If it must be admitted that the rule, to be deduced from the earlier cases, and from foreign ordinances, is that stated by Kent, Justice, in *Robinson v. The Marine Insurance Co.*, (2 John. 322,) namely, that a *pro-rata* freight is always due where the owner accepts the goods at an intermediate port of necessity, whether the acceptance be voluntary or compulsory; we, nevertheless, are of the opinion, that this doctrine is completely overruled by the more recent decisions, both in our own Courts and in the Supreme Court of the United States. We regard the law as now settled, that a *pro-rata* freight is only due where the owner of the goods elects to receive them at the intermediate port, and that this election can only be made when the master is able and willing to transport them to their port of destination. When the vessel is wholly disabled, and no effort or offer is made by the master or shipowner to transport the goods to their final port, by any other conveyance, their acceptance by their owner is compulsory, and no freight whatever is demandable. The right to freight *pro-rata itineris* must arise out of some new contract between the freighter and master, either expressly made, or to be inferred from their conduct.

That the master cannot recover, upon the original contract, which he has not performed, but must sue, if at all, upon some new contract, implied or expressed, will be found to pervade all the cases.

Such a contract cannot be implied, if the owner accepts them only from the necessity of the case, because under such circumstances, he will only take up his own goods; and the Court will not be able to imply, that, by such an acceptance, he had any intention to waive the completion of the whole agreement.

The shipowners cannot, on any principle, be entitled to freight on the portion of logwood which was sold to pay the necessary

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expenses of recovering and securing the part saved. That was lost, as absolutely, and totally, as the portion which was drifted to sea, and could not be reclaimed.

The logwood saved, has not been in the possession of the ship-owners, or of their agents, at any time since the wreck of the Emeline, and whatever claims they have, if any, upon the present plaintiffs for freight, they have no lien upon the moneys in the defendants' hands, which can operate as an answer to any part of the plaintiffs' action to recover the one-half of the net proceeds of the logwood sold. (*Caze & Richaud v. Baltimore Insurance Co.*, 7 Cranch. 358 ; 9 J. R. 191.)

The plaintiffs must have judgment for \$335.64, and interest.

HENRY DOOLITTLE, Respondent v. JOSEPH NAYLOR and PETER NAYLOR, Appellants.

When a purchaser of personal property, subject, at the time, to two mortgages which are valid liens thereon, promises one of the mortgagees, verbally, to pay to him a debt owing to him by a third person, which is secured by one of such mortgages, no action will lie on such promise, though founded on a good consideration.

Such a promise, is a promise to be answerable for the debt of a third person, which such third person continues liable to pay, and is void by the statute of frauds, unless in writing, and unless such writing expresses the consideration of it.

If such promise, instead of being made to such mortgagee, is made to a third person who is not liable for the payment of such debt, no action will lie upon it at the suit of such mortgagee.

But when, in order to become such purchaser, and retain the use of the property, and to dissuade the holder of the second mortgage from enforcing his mortgage by foreclosure, etc., and to induce the holder of the first mortgage to assign it to his friend, such purchaser promises the second mortgagee that he will pay the first mortgage, and will also, by a day named, pay the second mortgage, if a sum agreed on be deducted therefrom, and the second mortgagee agrees to the deduction, and agrees to forbear, and, in reliance on the promise, does forbear enforcing his mortgage to the day named ; and upon procuring such agreement, such purchaser, with the assent of the second mortgagee, induced by such promises, prevails upon the holder of the first mortgage—also induced by the promise that the second mortgage shall be paid—to assign the same to a third person, who advances the amount thereof—

And thereafter a sale is made, under the first mortgage, at the instance of such purchaser, and he again becomes the purchaser at the sale, and repays the advance

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so made, the first mortgage will, as between such purchaser and such second mortgagee, be deemed paid and extinguished, and the second mortgage be regarded as the first lien upon the property, although, as between such purchaser and subsequent incumbrancees, the first mortgage may still be treated as valid, and subsisting at the time of the sale so made under it.

Under such circumstances, the first mortgage will be treated as paid and extinguished, when that course is required to subserve best the purposes of justice. It will not be treated as subsisting and valid, except to subserve an innocent purpose injurious to no one.

And when, on established facts, such first mortgage, as between a purchaser at a sale under it and such second mortgagee, will be deemed satisfied and extinguished, a mortgagee of the same property, under a mortgage executed by such purchaser, will acquire no rights superior, in equity, to those of said second mortgagee. On the contrary, the lien of the latter will be preferred, in equity, to his.

(Before Bosworth and Woodruff, J. J.)

Argued, June 12; decided, December 5, 1857.

THIS action comes before the Court, upon appeals taken by the defendants, Joseph Naylor and Peter Naylor, separately, from the judgment which was rendered on a trial of the action before Hoffman, J., without a jury. It was commenced about the 27th of July, 1855, and brought to trial in February, 1856. It was brought by Henry Doolittle, as plaintiff, against Joseph Naylor, Abraham W. Gallier, Charles A. Coe, Henry Bradley, William H. Burroughs and Peter Naylor, as defendants. The defendants, Joseph Naylor, Charles A. Coe and Peter Naylor, severally, answered the complaint. The defendant, Gallier, though served with the summons, did not answer. The defendants, Bradley and Burroughs, were not served with the summons, and did not appear in the action.

Any statement of the pleadings is deemed unnecessary, beyond such notice as is taken of them in the opinion of the Court.

This action was brought by the plaintiff, as holder of a second chattel mortgage upon furniture, etc., in the hotel known as the Irving House, to have a sale made upon a prior chattel mortgage set aside as fraudulent, so far as the same might be claimed to foreclose the plaintiff's rights in the property, to have said prior mortgage declared extinguished by reason of certain payments, made, colorably, by third parties, but in fact, (as the plaintiff claimed,) by the defendant, Joseph Naylor, the person equitably bound to pay the same, and to charge said Joseph Naylor, per-

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sonally, with the payment of the amount due on the plaintiff's said second mortgage, as having, on purchasing the mortgaged property, assumed said mortgage. The judgment of the Special Term granted the relief so claimed, and it is from this judgment that the defendants, Joseph Naylor and Peter Naylor, have, severally, appealed.

Daniel D. Howard, the former lessee and conductor of the Irving House, sold out the unexpired term to the plaintiff, (Doolittle,) and William H. Burroughs, on the 27th September, 1852, and they, to secure the consideration money of such sale, and the future rents, executed the chattel mortgage, which, at the time of the transactions in question, was the first lien upon the property.

The plaintiff and Burroughs, as Doolittle & Burroughs, went into the possession of the hotel, which they carried on until Sept. 22, 1853, when plaintiff sold out all his interest in said hotel to Henry Bradley, and said Bradley, with Burroughs, joined in executing to plaintiff a mortgage on the furniture, to secure the consideration money, which was represented by certain promissory notes. This mortgage is the mortgage under which the plaintiff claims herein, being the second lien on said furniture, the Howard lien being the first.

Bradley & Burroughs carried on said hotel, paying the amounts becoming due on said two mortgages, until Sept. 18, 1854, when they failed, and made an assignment to George Taylor.

George Taylor, as assignee, carried on the hotel for a while, but on the 10th of February, 1855, made a sale, at auction, of all the right, title and interest, of said Bradley & Burroughs, and of him, the said Taylor, as assignee, to the lease of the Irving House, and to the furniture and fixtures therein, and the defendant, Gallier, became the purchaser. He at once, however, assigned his purchase, except the lease, to the defendant, Joseph Naylor.

So far as the facts have been stated, they were undisputed. As to other matters of fact, involved in the issues made by the pleadings, the Court found, (including the conclusions of law,) as follows, *viz.* :—

"That by the terms of the sale, made by George Taylor, as assignee, on the 10th of February, 1855, mentioned in the complaint, the property was sold expressly subject to all incumbrances, and among them were specified at such sale the mortgages: 1st. To

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Daniel D. Howard, for rent due and to become due at the rate of \$2,604.16 monthly, \$6,256.97 being stated to be the rent due on the first of February, 1855. 2d. To Henry Doolittle, the plaintiff, for about \$12,500 and interest; and 3d. To the Central Bank, for various amounts, then estimated at \$30,000. And the property was sold, subject to whatever might be due on the said mortgages.

"That the purchase made, at such sale, though in the name of the defendant Gallier, was, in fact, the purchase of the defendant Joseph Naylor, who immediately thereafter went into the possession of the Irving House, and occupied the same during the residue of the term which had been granted by said Howard to the plaintiff and William H. Burroughs.

"That prior to and in view of the said sale by said Taylor, the defendant Joseph Naylor had, in consideration of their forbearing payment of their mortgages, verbally agreed with said Howard, and with the plaintiff, that, if the said Naylor purchased at such sale, he would assume and pay to said Howard the rent due and to become due to him, in pursuance of the terms of his said mortgage; and had also verbally agreed with the plaintiff to assume and pay the amount of plaintiff's mortgage, upon his deducting the sum of \$1500 from what was then due upon it, which plaintiff agreed to do. That, in March, 1855, the rent to Howard being in arrear, and he taking measures to collect it, the defendant Joseph Naylor made an arrangement with the defendant Coe, by which the latter was to advance the amount of Howard's mortgage, upon consideration of a purchase of cigars, by Naylor—Naylor to have the mortgage assigned by Howard to Coe, and to make good to Coe any deficiency that might arise on a sale of the mortgaged property.

"That said Naylor negotiated such arrangement with said Howard, and settled its terms; that it was carried out by an instrument, dated 24th March, 1855, by which, in consideration of the sum of \$14252.42, agreed to be paid to Howard, he agreed to sign over to Coe the mortgage held by him; that Coe, on the 12th of April, paid the sum of \$9255.42, making, with 5000, previously paid by Coe, the whole of said sum so agreed to be paid to said Howard, but no formal assignment was made to Howard by Coe.

"That, just before this arrangement between Howard and Coe, the defendant, Joseph Naylor, in consideration that plaintiff

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would forbear to enforce his mortgage, again verbally promised and undertook to pay the amount of said mortgage, less the deduction of \$1500 previously agreed upon, and plaintiff did so forbear.

"That, upon the conclusion of the transaction between Howard and Coe, the defendant Joseph Naylor took measures to make a sale of the property in the Irving House, under the said Howard mortgage. He employed an auctioneer, and had an inventory made under his direction. The articles were appraised at \$16,755.03, as what they would bring for cash at auction, and were sold on the 3d of May, 1855, under the direction of said Naylor, producing a little over \$8000. The sale was made by rooms, and in a way calculated to prevent a fair value being obtained. Said Joseph Naylor purchased the whole, with some inconsiderable exceptions, and then repaid Coe on the 5th of May, \$8189.40, and on the 7th of May, \$6064.94, being the amount of Coe's advance and interest, both these sums coming from Naylor.

"That the conduct of said Joseph Naylor, in effecting the said arrangement, between said Howard and Coe, and in the sale and other proceedings, under said Howard mortgage, was fraudulent against the plaintiff and a breach of faith towards him, and amounted, virtually, to a payment by said Naylor, out of his own funds, of the Howard mortgage, which was thus satisfied and extinguished.

"That said Joseph Naylor has never paid any part of the amount due to the plaintiff, upon his said mortgage, and plaintiff is still the owner and holder thereof, and of the note of \$11,654.37, which, with interest from the 22d September, 1853, became and fell due on the 4th January, 1855, and still remains unpaid, and was the amount for which said Naylor then remained a security.

"That, on or about the 2d day of June, 1855, the defendant Joseph Naylor executed and delivered to the defendant Peter Naylor a chattel mortgage, bearing that date, to secure the payment of a promissory note, bearing the same date, made by said Joseph Naylor to said Peter Naylor, for the sum of \$10,000, payable on demand, of and upon the furniture and fixtures in the said Irving House, embracing the furniture and fixtures so purchased by said Naylor at the sale of the 3d May, 1855, under said Howard's mortgage, which said mortgage to said Peter Naylor

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was duly filed in the Register's Office of the City and County of New York, on the 22d June, 1855.

"That, of the said sum of \$10,000, which the said mortgage to Peter Naylor purported to secure, the sum of \$6688.13 was for cash and notes loaned and advanced, by said Peter Naylor, to and for the said Joseph Naylor, upon the faith of said mortgage, but the residue, to wit, \$3311.87, was a former debt, arising out of notes, or endorsements, previously made by said Peter Naylor for said Joseph Naylor.

"That, said Peter Naylor does not appear to have had any notice, at the time of receiving said mortgage, of the lien or claim of the plaintiff upon the mortgaged property.

"I therefore find and decide, that the plaintiff's mortgage, notwithstanding the sale of the 3d May, 1855, under the mortgage given to Daniel D. Howard, remained, after that sale, a valid and subsisting security, as against the defendant Joseph Naylor, for the amount remaining due thereon, less the sum of \$1500, with interest from February 10th, 1855, agreed to be deducted therefrom as aforesaid, upon all the property embraced in said mortgage, and after the repayment, by the said Joseph Naylor to Charles A. Coe, of the amounts advanced by said Coe to Daniel D. Howard, was the prior lien and incumbrance on said property, subject to the deduction therefrom of the sum aforesaid.

"That the defendant Joseph Naylor is personally liable for the amount due on said mortgage, deducting the sum of fifteen hundred dollars and interest from the 10th day of February, 1855, and that plaintiff is entitled to judgment against him accordingly.

"That the mortgage, to the defendant Peter Naylor, is not entitled to a preference over the said mortgage of the plaintiff, but is a subsequent lien, or incumbrance, and is subject thereto.

"And it appearing that the said mortgaged property has been sold, under a stipulation between the parties, and the proceeds received by the defendant Peter Naylor, the plaintiff is entitled to judgment, that the defendant Peter Naylor pay to said plaintiff, out of the proceeds of said sale, his costs herein, against the defendants, and the amount of his said mortgage debt—to wit, the sum of \$11,654.37, with interest from the 22d day of September, 1853, deducting the sum of \$1500, with interest thereon from the 10th of February, 1855—and that the defendant Joseph Naylor

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pay to the plaintiff any deficiency there may be, after applying such proceeds."

The judgment rendered thereupon, exclusive of its recitals, is as follows, viz.:—

"It is hereby adjudged, in accordance with the decision of said Justice, that, at the sale of the property in the Irving House, made on the 10th February, 1855, by George Taylor, assignee, as stated in the complaint, said property was sold expressly subject, among other liens and incumbrances, to the mortgage of the plaintiff, described in the complaint; that the purchase, made at such sale, though in the name of the defendant Gallier, was, in fact, the purchase of the defendant Joseph Naylor, who immediately went into possession of the Irving House, and occupied the same during the residue of the term, which had been granted to the plaintiff and William H. Burroughs.

"That defendant personally assumed the payment of the amount due plaintiff, on his said mortgage, on the said 10th day of February, 1855, less a deduction of \$1500, which plaintiff agreed to make, and is liable therefor.

"That the conduct of the defendant Joseph Naylor, in effecting the arrangement for the purchase, by the defendant Coe, of the mortgage held by Daniel D. Howard, mentioned in the complaint, and the sale of mortgaged property made on the 3d day of May, 1855, under the said mortgage, was fraudulent, and the said sale void as against the plaintiff, and did not discharge the lien of his mortgage upon the said property, as against the defendant Joseph Naylor.

"That the defendant Joseph Naylor, shortly after said sale, repaid to said Coe the moneys paid by him to said Howard, on account of said mortgage of said Howard, which was thereby discharged and extinguished, and plaintiff's mortgage remained the prior lien and incumbrance on the property.

"That no part of the said mortgage debt of plaintiff has been paid, but the same is still due and unpaid to the plaintiff, who is the owner and holder thereof, and it is hereby adjudged, that plaintiff recover the sum secured by said mortgage, with the deduction aforesaid, against the defendant Joseph Naylor, amounting, with interest, at the date hereof, to the sum of twelve thousand two hundred and twenty-eight dollars and seventy-two cents.

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"That the mortgage to the defendant Peter Naylor, mentioned in his answer herein, is not entitled to a preference over the said mortgage of the plaintiff, but it is a subsequent lien and incumbrance, and subject thereto.

"And it appearing, from the stipulations herein, that the mortgaged property has been sold, and the proceeds received by the defendant Peter Naylor, it is further ordered and adjudged that said defendant Peter Naylor, out of said proceeds, pay to the plaintiff, or his attorneys, the sum of \$372.07, adjudged to the plaintiff for his costs and charges in this action, with interest from the date hereof, and also the sum of \$12,228.72, so adjudged as aforesaid, against the defendant Joseph Naylor, with interest from the date hereof, and that in case the said proceeds be insufficient to pay the said amounts and interest, the said defendant, Peter Naylor report to this Court the proceeds so received by him, and his disposition thereof, specifying the amount of such deficiency, and that the defendant Joseph Naylor pay the same to plaintiff."

Judgment was entered on the 22d of April, 1856. The stipulations, referred to in the judgment, formed part of the case, and, exclusive of the title of this action, read thus, viz. :—

"The plaintiff hereby stipulates not to interfere with, or obstruct, by enforcing the injunction herein, or otherwise, the sale of the furniture and other personal property in the Irving House, embraced in the mortgage to the plaintiff in the complaint mentioned, now advertised, under the direction of the defendant Peter Naylor, by Henry H. Leeds & Co., auctioneers; and said defendant Peter Naylor, in consideration thereof, hereby stipulates and agrees with the plaintiff, as follows:

"That the net proceeds of said sale, deducting the auctioneers' fees and charges, shall be considered a fund in Court, subject to the judgment that may be entered in this action, to the same extent that the property itself would be, if not sold; that the amount of said net proceeds, over and above the sum which the mortgage from Joseph Naylor to Peter Naylor, mentioned in the answer of said Peter Naylor herein, purports to secure, shall be forthwith deposited in the New York Life Insurance and Trust Company, to abide the judgment of this Court; and that the amount of said proceeds, received by the said Peter Naylor, under

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said mortgage, he will retain, subject to the judgment of this Court; and that he will file satisfactory security, by bond, with one surety, to pay over, or deposit the same, as may be adjudged by said Court, unless he appeal from such judgment, and give security to stay the execution thereof, according to law.

"And the said Peter Naylor stipulates and agrees that the total net proceeds of said sale, less auctioneers' fees and charges as aforesaid, shall be paid over by the auctioneers to him, the said Peter Naylor, and be by him deposited or held as aforesaid, and that no part thereof shall be paid to the said Joseph Naylor, and nothing herein contained is to be considered as waiving the right of the plaintiff to treat as a violation of the injunction in this action any interference by the defendant, Joseph Naylor, with the said property or proceeds thereof.

"This stipulation not to apply to the sale of the property in said Irving House, not embraced in the plaintiff's mortgage, or the proceeds thereof, nor to bind the said Peter Naylor to proceed with the sale of any property which he shall not consider to be correct, covered by his mortgage.

PETER NAYLOR.

"New York, February 25, 1856.

"SPEIR & NASH, *Plff's At'tys.*"

SECOND STIPULATION.

"An auction sale having been made, by H. H. Leeds & Co., auctioneers, of the furniture and other personal property contained in the Irving House, which sale Joseph Naylor claims embraces, besides the property referred to in and covered by the foregoing stipulation, other property of Joseph Naylor, not covered by the plaintiff's mortgage, but without specific separation of the property sold by direction of Peter Naylor, in accordance with such stipulation, from the other property so sold by direction of Joseph Naylor, and there having been as yet no ascertainment of the respective proportions of the proceeds of sale, which arise from such sources respectively, and the said Joseph Naylor having directed the said auctioneers to pay over his proportion, if any of such proceeds to said Peter Naylor, it is agreed that the whole amount received by Peter Naylor, as net proceeds of the sales aforesaid, as well by virtue of such order or direction of Joseph Naylor as otherwise, shall, after first reserving thereout the amount of said

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Peter Naylor's mortgage, as mentioned in said stipulation, be deposited by said Peter Naylor in the New York Life Insurance and Trust Company, there to remain until it shall be ascertained in this suit, or by some other proceeding to which the plaintiff shall be a party, what proportion thereof arises from the sale of the property embraced in the plaintiff's mortgage, which portion only shall be subject to the provisions of the foregoing stipulation. It being understood, that although no portion of the fund, so deposited, is to be actually withdrawn, until judicial ascertainment of the respective proportions thereof as aforesaid, except in case of a determination in this suit, to the effect that the plaintiff has no lien thereon, yet nothing herein contained, nor the said Joseph Naylor's permitting the whole proceeds to be deposited as aforesaid, shall prevent the said Joseph Naylor from making, in the mean time, any lawful transfer or disposition of his interest in the fund, so remaining on deposit, subject to such rights as the plaintiff may have (if any) by reason of the pending of this action, and of the matters involved therein.

"Nothing herein contained is to be considered as waiving the injunction order herein, except so far as to sanction the auctioneers' sale, the plaintiff claiming to enforce said injunction against any act of the defendant Joseph Naylor, in respect to the proceeds of such sale, in fraud of the plaintiff's rights in this action.

"PETER NAYLOR.

"Dated, March 8, 1856. SPEIR & NASH, *Plff's At'tys.*"

The defendants, who appealed, duly filed exceptions to the decision.

On the trial, Joseph Naylor objected to the admission of any evidence tending to prove a parol agreement, by him, to assume the debt, owing by Bradley and Burroughs to the plaintiff. The objection was overruled, and such evidence received, and he excepted to the decision.

So much of the evidence given, as is necessary to be stated, will be found in the opinion of the Court.

Wm. M. Everts, for the appellants, made and argued the following points:—

I. The evidence does not prove any verbal agreement by Jo-

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seph Naylor to pay, either the debt to Howard, or the debt to the plaintiff. There is no proof of any verbal agreement, by Joseph Naylor, to assume Bradley's debt to the plaintiff, prior to the purchase, by Joseph Naylor, from the assignee of Bradley & Burroughs, February 10, 1855.

II. Such a verbal promise, if proved, and upon a valid consideration proved, being for the payment of an existing debt of another, would be wholly void under the Statute of Frauds, for want of a writing. Bradley remained always bound to the plaintiff for the debt, and the mortgaged property, also, was bound to him. So, for any payment, on account of the debt assumed, beyond the proceeds, or value, of the mortgaged property, Bradley would have been liable to Joseph Naylor, unless for the reason that such payment might be held voluntary.

III. The foreclosure of the prior mortgage, to Howard, was valid and *bona fide*, and the sale vested in Joseph Naylor a title, clear of the second mortgage, whether Joseph Naylor was personally liable for the second mortgage debt or not.

IV. If the foreclosure sale was not regular and valid, then the mortgage was not satisfied thereby, and it is now to be first paid from the proceeds of the mortgaged property.

V. In either alternative, the new mortgage to Peter Naylor, in good faith and without notice, is a better lien than the plaintiff's. To give the plaintiff's mortgage a better place, upon the mortgaged property, than belonged to it, by its own contract, at the expense of Peter Naylor's lien, which is supported upon the title made through the prior mortgage to Howard, is grossly inequitable.

VI. But, supposing that the foreclosure sale, under Howard's mortgage, is open to impeachment, in equity, as against the plaintiff, yet such latent equity cannot override the lien acquired *bona fide*, without notice, and for value, by Peter Naylor, while the legal title and possession, made and delivered under such foreclosure sale, was in Joseph Naylor, his mortgagor. Peter Naylor's equities are perfect, and he has the legal title besides.

S. P. Nash, for the plaintiff.

I. The findings of fact, by the Judge at Special Term, are all

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fully warranted by the evidence; and they will not, therefore, be disturbed on appeal.

II. Joseph Naylor himself was the party equitably bound to pay the greater portion of the debt due, on the Howard mortgage, on the 1st of May, 1855, irrespective of his having assumed the payment of that mortgage. The mortgage was to secure the rent of the premises, and Naylor had the use of them from the 10th of February. The whole sum paid Howard was \$14,254.42, all of which, except \$6,256.97, accrued during Joseph Naylor's tenancy.

III. Joseph Naylor's agreement with the plaintiff to assume and pay the Howard mortgage, and also to assume and pay plaintiff's mortgage, was a valid agreement. It was founded on a valuable consideration, namely, plaintiff's agreement to forbear and to remit \$1500 of his claim. It was made just before Naylor became the purchaser of the property, and was explicitly renewed and affirmed after he had purchased and become the owner of the property on which the mortgages were liens. (2 Kent's Comm. 465; *Seaman v. Seaman*, 12 Wend. 381; *Elting v. Vanderlyn*, 4 Johns. 287; *Mapes v. Sydney*, Cro. Jac. 683; *Charter v. Stevens*, 3 Denio, 38.)

IV. Joseph Naylor's agreement to pay plaintiff's mortgage, less \$1500, was not only founded on a valuable consideration, but was not within the Statute of Frauds, and was therefore valid, though not in writing. The statute, avoiding promises not in writing "to answer for the debt, default or miscarriage of another person," (2 R. S. 136, § 2, sub. 2,) does not apply to the case where the party promising receives property wherewith to pay the debt he assumes, and becomes, as between himself and the original debtor, the principal debtor, and bound to pay the debt as his own, the original debtor standing to him in the relation of a surety. (*Kingsley v. Balcome*, 4 Barb. 131; *Mercein v. Andrus*, 10 Wend. 461; *Murray v. Smith*, 1 Duer, 412; *Lippincott v. Ashfield*, 4 Sandf. S. C. Rep. 611; *Wyman v. Smith*, 2 Id. 331; *Blyer v. Munholland*, 2 Sandf. Ch. 478; *Barker v. Bucklin*, 2 Denio, 45; *Nelson v. Boynton*, 3 Metc. 396; *Trotter v. Hughes*, 2 Kern. 74.) That is this case. Naylor bought this property, a balance of the purchase money being still unpaid, subject to the mortgage which secured that balance, and assumed, personally, to pay the mortgage. He thus became the principal debtor, and, as

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to him, Bradley and Burroughs, the original promisors, stood in the place of sureties. (*Trotter v. Hughes*, 2 Kern. 74, 79.)

V. The re-payment to Coe, by Joseph Naylor, of the amount advanced by him to take up the Howard mortgage, extinguished it. While Coe remained unpaid, it may have continued valid in his hands for his security; but, when Joseph Naylor repaid his advance, the lien of the mortgage was gone. Joseph Naylor so considered it, when he mortgaged the same property to Peter Naylor, within a month afterwards. Wherever the money, which goes to pay off a mortgage, comes, in fact, no matter through what covered and tortuous channels, from the owner of the equity of redemption, it discharges the lien; and this is found by the decision to be the fact in this case.

VI. But it is contended, that before the mortgage was extinguished, plaintiff's rights were also destroyed by the sale of the 3d May. This would be so, had that been, in reality, a proceeding, on the part of Coe, to collect his money, fairly and honestly conducted; but the decision finds it to have been, in fact, a proceeding on the part of Joseph Naylor, the owner of the equity of redemption, who had personally assumed the payment of the mortgage he was attempting to cut off, and that it was fraudulently and dishonestly conducted. It therefore left plaintiff's mortgage an unforeclosed lien, so far as Peter Naylor was concerned. (See *Jencks v. Alexander*, 11 Paige, 619.)

VII. After this pretended foreclosure, and the repayment to Coe of his claims, under the Howard mortgage, that mortgage being extinguished, and plaintiff's mortgage not foreclosed, Joseph Naylor held the property, subject to plaintiff's mortgage, and subsequent purchasers, or mortgagees from him, took also, subject to that mortgage. Peter Naylor's rights are not, therefore, paramount to plaintiff's.

The purchaser of personal property buys at his own peril; acquires the title of his vendor only, with all its defects, subject to all specific liens upon it, except—first, where the property is negotiable paper, purchased in good faith, for a valuable consideration; second, where the purchaser buys of a party in possession, upon whom the true owner has voluntarily conferred an apparent right to sell, or entrusted with such documents as constitute *indicia* of title. (*Saltus v. Everett*, 20 Wend. 267; *Herring v. Wil-*

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Lard, 2 Sandf. S. C. Rep. 419; Wood v. Colvin, 2 Hill, 566; Peabody v. Fenton, 3 Barb. Ch. 451.)

If Peter Naylor had bought, in good faith, at the pretended foreclosure sale, and paid his money, he might have come within the rule, because Coe was ostensibly exercising a valid power of sale, but he claims under Joseph Naylor, to whom that sham sale was no protection.

VIII. But if Peter Naylor's mortgage is to be considered prior to plaintiff's, it can only be so considered to the extent of his new advance. His prior debt must be deducted. (*Root v. French, 18 Wend. 570; Ray v. Birdseye, 5 Denio, 619.*)

By THE COURT. BOSWORTH, J.—At the date and upon the execution of the agreement of the 24th of March, 1855, between Howard and Coe, independent of the question of the extent to, and the manner in which the rights and liabilities of either of the parties may have been affected by any parol promise of J. Naylor, to pay the mortgage held by Howard, and the mortgage held by the plaintiff, the rights and liabilities of the parties, according to the facts, as found, were as follows:—

Joseph Naylor was the owner of the leases, furniture and fixtures of the Howard House, subject to a mortgage, executed by the plaintiff and Burroughs to Howard, on the 27th of September, 1852. This was the first lien. Such ownership was also subject to a mortgage, covering the same property as the first, and some chattels, in addition, executed by H. Bradley and Burroughs, to the plaintiff, on the 22d of September, 1853. This was a second lien. The other mortgages and liens, to which such ownership was subject, not being material to the decision of any question presented by this appeal, need not be mentioned.

Under the agreement between Howard and Coe, of the 24th of March, 1855, the Howard mortgage was a valid and available security, in the hands of Coe, for the amount of his advances, being \$14,254.42.

Although it is not so stated, as a part of the facts found by the Court, yet the testimony is uncontradicted, that the plaintiff assented to the execution, by Howard to Coe, of the agreement of the 24th of March, 1855.

Under such circumstances, Coe had the right, as against the

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plaintiff, to have the mortgaged property sold, and the proceeds applied to pay, first, the amount due to Howard on the mortgage, which he had sold to Coe. Any *bona fide* purchaser of the property, at a regular and legal sale of it, under the Howard mortgage, would acquire a valid title to it, as against the plaintiff. Any mortgagee of such property, under a mortgage, executed by such a purchaser, would acquire a specific lien upon it, unaffected by any claim of the plaintiff arising upon the mortgage executed to him, by Bradley and Burroughs.

As against Coe, or any person succeeding to his rights, or as against any *bona fide* purchaser, at a regular sale, under the Howard mortgage, the plaintiff, inasmuch as he assented to the agreement between Howard and Coe, such assent having been required by Howard, before he would enter into the agreement, is not at liberty to object, that the sum which Coe agreed to pay, and did pay to Howard, for the mortgage, was not owing upon and secured by it.

The Court, at Special Term, found, that "the conduct of J. Naylor, in effecting the arrangement between Howard and Coe, and in the sale and other proceedings under said Howard mortgage, was fraudulent against the plaintiff, and a breach of faith towards him, and amounted virtually to a payment by said Naylor, out of his own funds, of the Howard mortgage, which was thus satisfied and extinguished."

This finding would seem to have been stated, rather as a conclusion of law, than one of fact. It is not found, as a fact, that these proceedings were designed and prosecuted with an intent to defraud the plaintiff of the lien of his mortgage.

The evidence of Mr. Rodman shows, that he had agreed, as the authorized attorney of the plaintiff, that the property should be sold under the two mortgages, and that it was unnecessary that the furniture should be sold in parcels. It is true, that this agreement was part of an arrangement claimed to have been made between Rodman and J. Naylor, by which the latter was to secure the payment of the mortgage held by the plaintiff, and which, it is claimed, J. Naylor had previously agreed to pay. One of the papers, which was drawn for the purpose of effecting that arrangement, was signed by J. Naylor, and, for aught that is proved or has been found, it may fairly be said, he expected and believed

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he should induce the other persons to execute them, whose execution of them, or of either of them, would have been satisfactory to the plaintiff.

The fact, therefore, that the furniture was sold in lots, although, under all the circumstances, it may operate as a fraud upon the plaintiff, if held to be an absolute foreclosure of the lien of his mortgage, as between him and the two Naylor's, was not deemed by the Court at Special Term, either of itself, or with the other evidence, to justify the conclusion of an actual intent to thereby defraud the plaintiff. At all events, no such conclusion is stated, as a fact found.

Whether the verbal promise, made by J. Naylor to the plaintiff, and the sale, considering the circumstances under which it was made, and the fact, that J. Naylor was the highest bidder, and the purchaser at such sale, not only extinguished the Howard mortgage, both at law and in equity, as against the plaintiff, but left the mortgage, held by him operative as a valid lien upon the property, and made J. Naylor personally liable to pay to the plaintiff the mortgage held by the latter, are the important questions to be determined. We will, first, consider the question of J. Naylor's personal liability.

The Court, at Special Term, found, as facts, that prior to, and in view of the sale by Taylor, the defendant Joseph Naylor, in consideration of their forbearing payment of their mortgages, verbally agreed with Howard, and with the plaintiff, that if he purchased at such sale, to assume and pay to Howard the rent due, and to become due, to him, and to the plaintiff the amount due on his mortgage, upon his deducting \$1500 from the amount then due upon it, which the plaintiff then agreed to do.

That just before the arrangement between Howard and Coe, of the 24th of March, 1855, J. Naylor, in consideration that the plaintiff would forbear to enforce his mortgage, again verbally promised and undertook to pay the amount of said mortgage, less the deduction of \$1500, previously agreed upon, and plaintiff did so forbear.

On these facts the Court concluded, as matter of law, that J. Naylor was personally liable to pay the plaintiff the amount due on the mortgage held by the latter, less the sum of \$1500, and ordered a judgment in favor of the plaintiff, against J. Naylor, for

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any deficiency in the proceeds of the mortgaged property to satisfy that much of the mortgage debt.

We have no doubt, that a clear and express agreement of J. Naylor, as owner of the property subject to the mortgage, to pay the amount due to the plaintiff, or a part of that amount, in consideration of an equally distinct promise of the plaintiff to forbear generally, coupled with actual forbearance, or to forbear for a definite period, to interfere with the property by a foreclosure of the mortgage, would be a valid contract, unless it is essential to its validity that it should be in writing, and that the writing express such consideration.

The damage to the plaintiff, from delaying to enforce his securities, and by abating a part of his claim, in consequence of such an agreement, or the benefit to Joseph Naylor, from being permitted, in consequence of such an agreement, to retain the possession and use of the property, and make such profitable disposition of it as opportunities might offer, would be a sufficient consideration for such an agreement.

The evidence on this subject is somewhat loose and indeterminate. Mr. Rodman, who negotiated on the part of the plaintiff with J. Naylor, says, that a short time prior to the sale by Taylor, "I agreed with him, (J. Naylor,) on Doolittle's behalf, to defer proceeding upon Doolittle's chattel mortgage, and he said he would pay Doolittle the amount due on that mortgage, less \$1500." "and he would buy the property at the sale which was then contemplated." "I told Naylor I wanted some security for his performance of that agreement." "Naylor assured me he would do what he had agreed to do, and he was able to do it." That the plaintiff should be paid, was re-affirmed on the day of the sale.

When the agreement between Howard and Coe was ready to be executed, Rodman's assent to it, as agent of Doolittle, was required. J. Naylor assured him, that he would carry out his arrangements with Rodman, and that Doolittle should have his money, or words to that effect. Rodman stated, that he should rely on these assurances, and gave his assent, and advised the plaintiff of it.

Matters remained in this position, as between the plaintiff and J. Naylor, until the 11th of April, on which day another inter-

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view took place between J. Naylor and Rodman. From that time there were negotiations between them, for a short period, with a view to put their agreement or understanding in a precise and definite form, or to come to some definite and satisfactory arrangement. The written agreements which were drawn to effect that object, the form and terms of which were assented to, and one of which was executed by J. Naylor, fixed the first of May, 1855, as the day on which the plaintiff should be paid, either in cash, or by endorsed notes.

By each of these two instruments, Doolittle was to sell, and Joseph Naylor was to purchase the note made by Henry Bradley, and the chattel mortgage which the plaintiff held as security for the payment of the note.

The agreement first drawn was not executed by any one. That secondly drawn was executed by Joseph Naylor and John A. Bidwell, but because it was not executed by Mr. Coe, the plaintiff declined to accept it.

The plaintiff had then a suit pending against Joseph Naylor, to restrain him from removing the furniture from the Irving House, and as early as the 17th of April, 1855, had obtained a temporary injunction, and had given notice of moving for a permanent injunction.

That motion was adjourned from day to day, for a few days, while the plaintiff and J. Naylor were negotiating, with a view to come to some definite result, and when the second written agreement was rejected, the plaintiff made his motion for a permanent injunction, and the motion was denied and the injunction dissolved as early as the 30th of April, 1855. That was the end of the negotiation.

The agreement by Naylor, to pay the plaintiff, is stated in the complaint in these words: "And this plaintiff, on information and belief, avers that it was expressly understood and agreed, between this plaintiff, through his agent, and said Taylor, assignee as aforesaid, and said Naylor and Howard prior to said sale," (by Taylor,) "that said Naylor should pay the said \$2700 in cash prior to said sale, that he should buy the furniture and fixtures at the sale, and that when he had done so, he should pay the rent, then in arrear, and to become due, to the said Howard, and pay the amount due to the plaintiff, with a deduction of \$1500,

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on or before the first day of May then next; and on these conditions, relying on the said Naylor's assurances of his intention and ability to do so, the plaintiff assented to said sale and forbore to enforce his said mortgage."

It is not expressly averred, in this statement of the alleged contract, that Doolittle agreed to forbear, either generally and indefinitely, to enforce his mortgage, or until the first of May then next, or at all.

In construing the finding of the Court in respect to the agreement, in the light furnished by the pleadings and the evidence, we must understand it to be, that, prior to the sale by Taylor as assignee, Joseph Naylor verbally promised the plaintiff, in consideration of "the plaintiff forbearing payment of his mortgage," and "verbally agreed with the plaintiff, to assume and pay the amount of plaintiff's mortgage, upon his deducting the sum of \$1500 from what was then due upon it, which plaintiff agreed to do." The Court does not state, as a fact found, that the plaintiff did agree to forbear. And the subsequently stated fact, that just before the arrangement between Coe and Howard was concluded, Joseph Naylor, in consideration that plaintiff would forbear to enforce his mortgage, again verbally promised and undertook to pay the amount of said mortgage, less the deduction of \$1500, previously agreed upon, and plaintiff did so forbear," imports that the agreement on the part of Naylor was not only verbal, but conditional. He promised to pay if the plaintiff would forbear. How long he must forbear to make it obligatory upon J. Naylor to pay, is not found by the Court nor alleged in the pleadings. That the plaintiff absolutely agreed to forbear, is not directly averred, nor expressly found. But, notwithstanding the want of precision in the language of the complaint, and in that employed to state the facts found by the Court, it may fairly be held, and be understood as intending to mean, that J. Naylor did agree to pay the mortgage held by the plaintiff, less \$1500, and the plaintiff agreed to deduct that sum and give forbearance, as to the payment of the residue, and the first of May thereafter was the time to which forbearance was to be extended, and payment made, and that the agreement of the one party, was the consideration of that of the other.

But assuming it to be sufficiently proved and distinctly alleged

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that J. Naylor agreed to pay to the plaintiff the amount of the debt owing to him by Bradley, there is then presented the serious difficulty, that it was an agreement with Doolittle to pay, to him, a debt which Henry Bradley was owing to him.

It was, therefore, an agreement, not in writing, to pay the debt of a third person. It was not an agreement with the debtor, upon the receipt or purchase of something valuable from him, to pay, as its agreed price, to his creditor, the debt owing to the latter by such debtor. Such a transaction would, in equity, have made J. Naylor, as between himself and such debtor, the principal, and such debtor his surety, and such a promise could be enforced by action at the suit of the creditor of such debtor. (*Trotter v. Hughes*, 2 Kern. 74; *Halsey v. Reed*, 9 Paige, 446.)

Such a promise, if made, to Taylor, the general assignee, as he was not personally liable to pay the debt to the plaintiff, would confer no rights upon the plaintiff, to resort to Joseph Naylor. (*Trotter v. Hughes, supra*; *King v. Whately*, 10 Paige, 465.)

But the alleged verbal promise is found, as a fact, to have been made to the plaintiff, the creditor. He still retained the liability of Henry Bradley, his debtor. The promise was to pay a debt owing by Bradley, and to pay it to the plaintiff, to whom Bradley owed it, and the promise was made to the plaintiff, and Bradley was not a party to the transaction.

It was, therefore, a promise to the plaintiff, to be answerable to him for the debt of Bradley.

If the promise had been contemporaneous with the creation by Bradley of the debt to the plaintiff, and of the execution of the mortgage, although it might have been made upon a consideration sufficient to uphold it, it would be void, because the promise was not in writing, and in a writing expressing the consideration. (*Brewster v. Silence*, 4 Seld. 207; *Hall v. Farmer*, 5 Denio, 484.)

That the promise was made long after the debt of Bradley was contracted, does not make a stronger case for the plaintiff. The promise is collateral to the principal debt, and payment of that, by the principal debtor, would put an end to all claims, of the plaintiff against Joseph Naylor, based upon such promise.

In *Smith v. Ives*, (15 Wend. 182,) it was held, that forbearance to sue was not a new consideration, taking the case out of the statute. (*Watson v. Randall*, 20 Wend. 201.)

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It needs no citation of authorities to show, that all collateral promises, for the debt of another, must be in writing, expressing the consideration.

In the present case, it may be said that the consideration consisted, not only of the damage to the plaintiff from forbearing to foreclose the mortgage, but of the benefit resulting to the defendant from the use of the mortgaged property, in the mean time.

However ample may have been the consideration, the difficulty remains, that the contract, or promise, was, to pay the debt of a third person, and was collateral to it; and such promise was not evidenced by a writing subscribed by the defendant, and expressing the consideration. That objection, we think, is fatal to the plaintiff's right to recover a personal judgment against Joseph Naylor, merely by force of such promise. (*Larson & Sanders v. Wyman*, 14 Wend. 246; *Watson v. Randall*, *supra*.)

The remaining question relates to the effect to be given to the purchase made by Joseph Naylor, at the mortgage sale, as between him and the plaintiff, and as between the plaintiff and Peter Naylor.

The Court, at Special Term, found that, prior to the sale by Taylor, the assignee, Joseph Naylor verbally agreed, with said Howard and the plaintiff, that if J. Naylor purchased, at such sale, he would assume, and pay to Howard, the rent due, and to become due, to him, in pursuance of the terms of his mortgage, and also verbally agreed, with the plaintiff, to assume and pay the amount of the plaintiff's mortgage, upon his deducting the sum of \$1500 from its amount, which the plaintiff agreed to do. This promise of J. Naylor was based upon the promise of the plaintiff to so deduct, and also to forbear payment of his mortgage.

We have concluded, as already stated, that these facts, as found, are sufficiently upheld by the evidence, to preclude us from interfering with them.

And, although we have, also, concluded that no action will lie on such verbal promise, in favor of the plaintiff, against Joseph Naylor, and that the former cannot recover a personal judgment, against the latter, for the debt secured by such mortgage, merely by force of such promise, yet it does not follow that such fact, in connection with the other facts found, may not require us to hold, that the Howard mortgage, as between the plaintiff and Joseph Naylor, has been paid and extinguished.

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It may, on a given state of facts, be justly held, that such mortgage is extinguished, as between the plaintiff and Joseph Naylor; and that as between J. Naylor and any mortgagee subsequent to the plaintiff, J. Naylor has succeeded to, and yet retains all the rights of Howard, as first mortgagee. (*Ballard v. Leach*, 1 Williams, Vt. 491.)

On the facts, as found, it must be taken to be true, that the plaintiff forebore, to enforce his mortgage by selling the mortgaged property, from the 10th of February, 1855, relying upon the promise of J. Naylor to extinguish the prior encumbrance of the Howard mortgage, and to, also, pay the mortgage held by the plaintiff. Rent to Howard continued to accrue, at the rate of \$2604.16, monthly, and to that extent, to depreciate the value of the plaintiff's mortgage security. The mortgaged property was being daily much deteriorated in value, by J. Naylor's use of it, and the value of its use, in the mean time, J. Naylor was permitted to realize and enjoy, in consequence of the reliance placed upon his promise to pay both mortgages.

Although it be true, that when one, who has become owner of the equity of redemption, subsequently pays off a mortgage upon the property, a court of equity will sometimes treat the incumbrance as being kept alive, and the person who has so paid it, as succeeding to the rights of such mortgagee, yet it will only do so when that course will uphold an innocent purpose of the person so paying, and be injurious to no one.

We are of the opinion, that the acts of J. Naylor, in procuring the assignment of the Howard mortgage to Coe, and in subsequently selling the property, under the mortgage, and in purchasing it at such sale, amounted, in effect, as between him and the plaintiff, to an actual payment and extinguishment of that mortgage.

Howard was pressing for his money, and about to foreclose his mortgage; J. Naylor wished to effect some arrangement, by which Howard might be paid presently, while he, at the same time, could obtain further forbearance.

He found, in Mr. Coe, a friend, who would advance the money, on an assignment of the security held by Howard, and J. Naylor's promise, to make good any deficiency. The advance by Coe was, as between himself and J. Naylor, virtually, a loan to the latter.

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But Howard would not assign his mortgage to Coe, without the consent of the plaintiff was first obtained. And that was only obtained upon the reassurance, by J. Naylor, that he would pay the mortgage held by the plaintiff, less \$1500; and the confidence he created, that he would obtain, presently, for the plaintiff, satisfactory security, that such payment should be made on the first of May thereafter.

Under such circumstances, we think it was properly found, that this transaction, as between the plaintiff and J. Naylor, amounted to an actual payment and satisfaction of the Howard mortgage. Assuming him to have been honest, and acting in good faith towards the plaintiff, in making the promises and giving the assurance, by which he procured the plaintiff's forbearance and agreement, to deduct \$1500 from his debt, and by which he also obtained the plaintiff's consent to Howard's assignment of his mortgage to Coe, we must regard these acts as done in the execution of the agreement between himself and the plaintiff, and not as having been done with a view to mislead and injure him.

The sale, under the mortgage, after it was assigned to Coe, may, without imputing any bad faith, be treated as a clear indication of an intent of J. Naylor to keep that incumbrance alive, as between himself and any subsequent mortgagees, as to whom he owed no duty to pay or extinguish it.

We conclude, therefore, that the rights of J. Naylor are no stronger than if he had, without any assignment of the mortgage to Coe, paid it in full to Howard, and taken an assignment of it to himself.

If he had done the latter, then, as between himself and the plaintiff, such payment, under the facts and circumstances proved in this case, would have operated as a satisfaction of the mortgage, although, as between J. Naylor and mortgagees, subsequent to the plaintiff, it would not have that effect.

But unless it was held, as between J. Naylor and the plaintiff, to operate as an absolute payment and extinguishment of the mortgage, and if it should be treated in equity as a subsisting incumbrance, the result of keeping it alive would be, to defraud the plaintiff, and thereby enable J. Naylor to give effect to an unjust and dishonest purpose.

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We understand the rule to be, that, under such circumstances, it will be treated as paid and extinguished, when that course is required to best subserve the purposes of justice.

At all events, the purpose to be subserved must be an innocent purpose, and injurious to no one. (*Ballard v. Leach*, 1 Williams, 491; *Starr v. Ellis*, 6 J. Ch. R. 393.)

The mortgage to Howard having been, in fact, paid by J. Naylor, by the means before stated, and having thereby, as between him and the plaintiff, become actually extinguished, the plaintiff's mortgage, thereupon, became a first lien upon the property; and being a valid and legal lien, the mortgage subsequently executed to P. Naylor was subject to it, and the latter acquired no rights, except as a mortgagee, having a lien subsequent to that of the plaintiff.

The plaintiff's debt, to the amount established by the judgment appealed from, and the costs included in such judgment, with his costs of the appeals, should be paid out of the proceeds of the property covered by the Howard mortgage, if they are sufficient for that purpose; and if not sufficient, any property covered by that mortgage, and not sold, being in the hands of either Joseph or Peter Naylor, should be applied to that object, so far as it may be necessary to effect full payment. Any proceeds or property included in the mortgage to P. Naylor, not required to satisfy the plaintiff's debt and costs, as aforesaid, P. Naylor may rightfully retain.

Should the whole property and proceeds, properly applicable to that purpose, be insufficient to pay the plaintiff's debt and costs in full, there can be no judgment against J. Naylor for the deficiency. The judgment must be modified, to conform to these views.

Ordered accordingly.

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JAMES W. ELWELL v. MOSES CHAMBERLAIN, Jr.

The plaintiff was the owner of a promissory note, made by third persons, and employed a broker to sell it for him. The latter employed another person, as his agent, to effect the sale. The defendant agreed with such agent to buy the note, if another note, of the same makers, falling due on the 13th of October, owned by the defendant, and payable at a bank in Brooklyn, was paid. This negotiation was had in the City of New York. On the 14th of October, such agent positively represented that the note had been paid, which was untrue. On this representation, a check was given for the note, payment of which was stopped, and which is now sued upon. It was drawn to and endorsed by such agent, and by him delivered to the broker, and by the latter, to the plaintiff.

Held, that the false representation, of the agent of the broker, was of the same effect as if made by the broker himself, and that the plaintiff could not acquire a title to a security for money, so obtained.

Held, that whether the agent did or did not know that the other note was not paid, was immaterial.

(Before Bosworth and Hoffman, J. J.)

Heard, Nov. 16th; decided, Dec. 5th, 1857.

THIS cause was tried before Mr. Justice Slosson and a jury, and comes before the Court, upon an application for a new trial, on a case made. The learned Judge refused to permit the counsel of the defendant to go to the jury, upon certain questions of fact, holding, that there were none which it was their province to determine; and directed a verdict to be given for the plaintiff, which was accordingly rendered.

The principal question in the cause arose upon the following proposition, which the counsel of the defendant submitted, as a bar to the plaintiff's recovery, and which the Judge overruled: "That, although Mills was not directly employed by Elwell, still, as he acted for Elwell, and obtained the check by fraud, Elwell cannot avail himself of the benefit of the fraud, without also being responsible for the consequences of it."

The facts, bearing upon this proposition, are the following:—

The firm of Lane, West & Company made a promissory note, to their own order, dated the 20th of June, 1856, at four months, for \$2240.20, and endorsed it. The note was made to be sold in the market, to raise money for the firm. One Van Olinda got

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possession of the note, and brought it to Hotchkiss, a broker, shortly after it was made, who sold it. This sale was made to the plaintiff, Elwell, who, upon being applied to, refused to advance cash for it, but offered his own note, taking a discount of two and a half per cent. upon the note of Lane, West & Company. This was accepted, and the money raised by means of the plaintiff's note, went, it seems, to the use of that firm, through Van Olinda.

The date, of this transaction, is not distinctly fixed; but it was certainly before the 7th of October; very probably, was about the time of the date of the note.

Elwell, the plaintiff, thus became the owner of the note of the firm, having paid for it, by his own note, accepted as cash, and, for all purposes of the cause, to be treated as cash.

About the 7th of October, Elwell employed Hotchkiss, the broker, with whom he had made the previous arrangement, to dispose of the note for him. Hotchkiss employed Charles N. Mills for this purpose. Mills negotiated with the defendant; and finally, on the 14th of October, 1856, it was taken by the defendant, who gave his check for \$2215.20, on the Nassau Bank, dated that day, and drawn in favor of Mills, who endorsed it to the plaintiff.

On the 15th of October, the defendant stopped the payment of the check by the bank, and this action is now brought to recover the amount of it.

In the course of the trial, the defendant was sworn on his own behalf, and testified, that a few days before the 13th of October, Mills showed him the note, and requested him to buy it. He replied, that he had enough of Lane, West & Co.'s paper already; that he held a note of theirs which would fall due on the 13th, and was in a bank at Brooklyn; that if such note was paid at maturity, he would buy the one in question; that on the 14th of October, Mills called and said: "Your note is paid. Lane, West & Co. paid it yesterday, and you must now, according to promise, buy the present note." That he (defendant) replied, that he did not know it had been paid, but would take Mills's word for it, and buy the note. Mills repeated that it was paid. The check was then given, and on the ensuing morning, the 15th, the defendant received notice of the dishonor of the note in the Brooklyn bank, and then stopped the payment of the check.

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Mills was examined as a witness in the cause, upon the call of the defendant. The plaintiff did not question him as to the statement of the defendant, and the defendant did not seek to corroborate that statement by him.

E. C. Benedict, for the plaintiff.

Wm. M. Allen, for the defendant.

HOFFMAN, J.—The evidence of the defendant must be treated as entitled to credit, and it proves the case of a condition affixed to the agreement to purchase the note; of a positive false representation by Mills, that the fact had occurred upon which the condition rested, and the purchase was to be made; and of the consummation of the bargain upon the faith of that unequivocal representation.

Whether Mills knew that the note referred to was unpaid or not, is immaterial. He undertook to state, as a fact, that it had been paid, being fully apprised that the defendant would not otherwise take the note in question.

If Mills, the payee of the check, were the plaintiff, it would be impossible to hesitate a moment in denying a recovery; or had Hotchkiss made the representations, the plaintiff would clearly have been affected by them. His authority was to sell the note. What he said or did, in relation to such sale, was within the scope of his power. (*Sandford v. Handy*, 23 Wendell, 265.)

What is the effect of the representations being made by Mills, employed by Hotchkiss?

It is true, that a factor or agent, entrusted with a particular duty, cannot delegate his power, and commit the discharge of that duty to another. The brief note of the case of *Moffat v. Wood*, (Selden's Notes of Cases, Court Appeals, December, 1853,) recognizes this rule.

But can the plaintiff, upon the facts as proved, receive this check from Mills, drawn payable to his order, obtained by his fraud, and be exempt from any liability for that fraud, and profit by it? Chamberlain had no knowledge, as far as appears, but that Mills was the actual owner, or that he was not dealing for an immediate principal.

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The plaintiff knew that Mills must have had some part in the negotiation of the sale, as the check was in his favor.

No doctrine would tend more effectually to promote the success of deception, and secure its fruits, than to hold, that a fraud practised by a servant or clerk of an agent employed to sell property, is not a ground of relief, when, if perpetrated by the actual agent, it would be sufficient.

The well-considered case of *Fitzsimmons v. Joslyn*, (21 Vermont, 129,) bears strongly upon this question. Creditors of a merchant had declined to sell him more goods; had referred him to another merchant, and had represented to the latter the good credit of the former. The merchant then sold him goods. The purchaser became insolvent.

It was held, that he was responsible for the statements of his creditors, and as the vendor was cheated by means for which he was responsible, such vendor could sustain trover for the goods, which were in the hands of the sheriff.

The proposition of Chief-Judge Redfield is thus expressed:—“With regard to representations made by others without authority at the time, the person who takes advantage of the influence of such false representations to obtain an unjust contract, or who adopts a contract made for his benefit, through the instrumentality of fraudulent representations, becomes himself a principal in the fraud, and it is the same as if he had made the representations himself.”

That there may be cases of representations made by persons so utterly disconnected from the party, as to exempt him from any responsibility for them, need not be contested. But when, as in the present case, there is a direct connection; when the fraud was practised by the servant of the actual agent, and when the party is, or ought to be aware of such employment, it cannot be allowed that the principal may shelter himself beneath the plea of his ignorance of the fraud.

A new trial should be granted, with costs to abide the event.

BOSWORTH, J.—When an agent, during and in the very course of a transaction, makes a false representation, though without actual fraud, of a matter which he declares to be within his personal knowledge, the principal cannot claim or hold any advantage

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therefrom, but the party dealing with such agent may rescind the transaction as soon as he discovers the untruth, and may then recover back any money paid, or property delivered. (Parson's Merc. Law, 152.)

Within this rule, Mills is to be deemed the agent of the plaintiff, although not employed by him. He has no title to the check, except by force of the transaction between Mills and the defendant. That the latter has a right to annul. (New trial granted with costs to abide the event)

FREDERICK A. PETERSON, Plaintiff and Respondent, v. EDMUND G. RAWSON, Appellant.

When an architect, who undertakes to superintend the erection of a building, which carpenters and masons contract to build and finish according to certain plans and specifications, and to the satisfaction of such architect, and who are to be paid in instalments, as the work progresses, and on production of the architect's certificates that they have become entitled thereto, such architect, to entitle himself to demand the compensation agreed to be paid for his services, must bestow such care and attention, that the carpenters and masons will not make any material variations from the plans and specifications, which ordinary care and attention, when bestowed by a competent architect, would detect and prevent, or detect in time to be remedied.

If he fail to bestow such care and attention, and in consequence thereof, the building is not constructed according to the contract, and damage to his employer results, he loses his claim to compensation, notwithstanding an action will lie, at the suit of his employer, against the contractors, to recover the damages; and although his employer may have settled with such contractors, in full, after the architect had refused to give them the certificates, which the contract required, as a condition to their right to be paid.

The architect, on the evidence given, having failed to bestow such care and attention, and the building having been defectively constructed, in consequence of such neglect, the judgment entered, on the report of a referee, finding that he was entitled to full payment, reversed, and a new trial granted.

(Before Bosworth and Hoffman, J. J.)

Heard, Nov. 15th; decided, Dec. 5th, 1857.

THIS case is brought before the Court, on an appeal by the defendant from a judgment entered in favor of the plaintiff, upon the decision of a referee.

The plaintiff, an architect by profession, entered into a contract with the defendant, to furnish him with plans, sections, elevations

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and specifications, with a general estimate of the expense of erecting; and to superintend the erection of, a new dwelling, about to be built by the defendant, in Lexington Avenue. The compensation was to be five per cent. on the cost, not exceeding \$10,000. The payments were to be made at periods specified.

The compensation amounted to \$500, and \$350 have been paid. The balance, \$150, was to be paid upon the completion of the building. This action is to recover that amount.

The defendant insists, that the plaintiff did not fulfil his agreement; that he did not properly and efficiently superintend the building, while the work was progressing, according to the terms of the agreement. The answer then sets forth various particulars, in which the plaintiff had neglected his duty.

The referee, to whom the action was referred, finds, that certain variations were made by the defendant himself from the plan, as originally adopted; and that the building was otherwise erected and finished in accordance with the plans, except that the balcony in front, and the front parlor windows, were about two inches and three-quarters higher from the parlor floor than was shown on the plan, and the front parlor windows were about the same distance higher from the parlor floor than the back parlor windows. A discrepancy in the height of the lowest step of the stoop is also found; and the effect of the change in the balcony and windows is pointed out.

He also finds, that the discrepancies and variations from the specifications and plans were in the work contracted to be done by the masons; that the variations in regard to the balcony and front parlor windows arose from the masons not having accurately conformed to the said specifications and plans, and the variations in the height and appearance of the lower step of the stoop, and the plan thereof, arose, partly, from the same cause, and partly, from the grade of the street not being level, as it was assumed to be on the plans.

That the plaintiff, in superintending the building, bestowed as much of his time and personal attention thereto, as is customary for architects, in such cases, or as is necessary, where the work is being done by competent builders; and that the variations, above mentioned, from the plans, were not caused "by carelessness, negligence or inattention, on his part."

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That, after the building was finished, the plaintiff refused to give a certificate to the said masons, to entitle them to receive the last instalment of \$1900, under their contract with the defendant; but that the defendant, nevertheless, paid or settled with them in full, for all claims, on their part, under such contract, without requiring such certificate.

The referee, upon these facts, held that the balance of \$150 was justly due from the defendant. Exceptions to the decision were duly filed, and from the judgment entered on the referee's report this appeal is taken.

H. H. Morange, for plaintiff and respondent.

J. E. Palmer, for defendant and appellant.

BY THE COURT. *HOFFMAN*, J.—The referee appears to have placed his decision chiefly upon the ground, that the refusal of the plaintiff to give the last certificate to the masons, and his general attention to the supervision of the work, entitled him to recover.

The default of the masons is admitted. Its effect upon the appearance of the room and otherwise, is found; and it was a defect as well as a deviation from the plan.

It may well be, that if a variation from the plans and specifications was of such a nature as not to be open to detection with ordinary vigilance, and disclosed itself only at a future stage of the building, a refusal to give the certificate when the fault was discovered, would justify the architect in still claiming his compensation.

But if ordinary care in superintending the work could detect a fault and lead to its immediate correction, or subject the contractor to suspension of his next payment, or perhaps the forfeiture of his contract, the architect cannot set up the possibility of his employers obtaining redress by withholding a future payment, to prevent his own neglect defeating his own action. His undertaking was to superintend the progress of the building; and the contract with the masons placed them entirely under his control. The work was to be done to his satisfaction, and under his direction; and his decision was to be final. The proposition cannot be maintained, that he can be entitled to his compensation in a

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case of his own neglect, because the owner could have obtained pecuniary redress, in another mode, from another person who has also broken his contract in respect to the same matter.

According to the evidence in this case, the error could have been detected, and the work stopped to correct it, at least, when the second-story beams were laid. Full four instalments were paid, in certificates given by the plaintiff, as architect, after this was done. Besides, his attention was called to the height of the balcony by one of the witnesses.

It appears to us, upon the testimony in this case, as it is now presented, that whatever may have been the general and deserved reputation of the plaintiff, and however strong the evidence of his giving such supervision as is ordinarily bestowed by architects, there was a failure in one particular, which is sufficient to defeat his action for the balance of his compensation.

Judgment reversed, and the report set aside. New trial ordered, and the rule of reference discharged. Costs to abide the event.*

WILLIAM RADFORD v. HARRIS WILSON.

Where a vendor of the unexpired term of a lease improperly refuses to perform the contract of sale, and deliver possession, compensation should be made to the purchaser, for the depreciation in the value of the term, by reason of the lapse of time, during the litigation.

The purchaser is not entitled (as he might, perhaps, have been in an action for damages upon a special case) to have any allowance, because material improvements, contemplated by him at the making of the contract, were prevented.

The amount to be allowed to him, is to be adjusted upon the basis of placing him in the same position as if the contract had been executed according to its terms, the premises continuing unchanged, though preserved in their then existing state of repair.

He should be allowed a full annual rent for the premises, deducting, however, all legal outgoings, such as taxes and ground rent; and should, also, be allowed a sum for the wear and tear of the buildings, unless properly kept up by the vendor.

* A person pursuing a privileged profession or trade, as an attorney, broker, or factor, is bound to exercise the care and skill properly belonging to the business he undertakes, and is responsible for the want of it. (*Person's Merc. Law*, 156, note 2, and p 159.)

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Hold, that these principles had been properly applied to the facts, by the judgment at Special Term, and such judgment affirmed.

In cases of this nature, the rule is, that a party to a contract of sale of lands, shall not be allowed to profit by his own fault, in not performing his agreement, nor to cause a loss to the other.

Where the fault is on the part of a vendor, the Court will, when justice requires it, relieve the purchaser from the payment of interest on his purchase money.

But in such case, the vendor remains entitled to the rents. (Per Hoffman, J.)

The vendee may elect, to treat the contract as really made at the time when he is put in possession. In such case, he may be exempted from paying interest for the period of litigation, but will leave the rents to the seller. All rights will be adjusted as if the contract was dated at the latter period. (Id.)

And in the case of the sale of an unexpired leasehold, by the lessee, the question will then be, what, upon the basis of the purchase money being the value at the date of the contract, is the value at the date of possession. (Id.)

If there is a decree in favor of the purchaser, under which he could take possession, and he omits to do so, the ordinary rules between vendor and purchaser, of charging interest on the one side, and rents on the other, will be observed from the date of such decree.

The plaintiff would have gained by adopting this rule; (see statement upon that basis;) but he has elected to make his claim upon the footing of his being owner from the date of the contract. (Per Hoffman, J.)

Principles of allowance, where the fault is on the part of the purchaser, discussed. (Id.)

(Before BOSWORTH and HOFFMAN, J.J.)

Heard Nov. 12; decided Dec. 5, 1857.

THIS action comes before the Court, at General Term, on an appeal by the plaintiff from parts of a judgment entered on the 8th of May, 1857.

The action was tried before Mr. Justice Duer, without a jury, in February, 1857.

The judgment entered, directed payment of a certain sum to the defendant by the plaintiff, which it is the object of the appeal to reduce. The grounds of the appeal are specified in three exceptions to the finding and conclusions of the Court, which are hereafter stated.

The material facts are as follows:—

On the 16th of March, 1853, a written agreement was entered into between the plaintiff and the present defendant, together with one Sarah Smith, by which the plaintiff agreed to purchase of them, and they agreed to sell and convey the leasehold premises No. 45 Jay street, for the sum of \$4500; the sum of \$100 to be paid down, \$400 on the first of May ensuing, and the balance,

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\$4000, to be secured by bond and mortgage. The first floor of the premises was, at that time, under a sub-lease for two years from the first day of May, 1853.

The vendors having refused to fulfil the contract, an action was commenced to compel a performance of their contract. Various defences were interposed, which it is needless to notice. On the 18th of June, 1856, the cause was tried, Wilson then being sole defendant, and a judgment was pronounced, directing him to execute an assignment of the leasehold premises with certain covenants on his part, upon payment to him of the sum of \$4400, the unpaid balance of the purchase money; and that the plaintiff, upon the receipt or tender of such assignment, or within sixty days after such tender, should pay the said sum of \$4400, and thereupon should be let into possession of the property.

It was also ordered that the plaintiff recover of the defendant his damages for the non-fulfilment of the contract; and that he might deduct the same from the purchase money, provided he procured a report fixing the amount thereof within sixty days.

A reference was ordered to ascertain such damages, and the referee was directed to credit the defendant, with interest on the \$4400, from the first day of May, 1853, as a set-off against such damages.

The referee found, as facts, and Mr. Justice Duer, at Special Term, adopted the same, as his own finding, as follows:—

“That the rents of the premises, from the first day of May, 1853, to the 18th day of June, 1856, were at the rate of \$650 per annum, and were received by the defendant.

“That the premises were devoted to as good purposes during that period as the nature and condition of the buildings, upon the property on the first of May, 1853, and up to the 18th of June, 1856, would fairly allow, and that such rents were all that the defendant by diligent attention and good management of the property in such condition of the buildings could fairly obtain.

“That, for the year commencing on the 1st of May, 1856, the defendant rented such premises, for the sum of \$675.

“That the location and situation of the said premises is such, that intermediate the 1st day of May, 1853, and the 18th of June, 1856, their fair value, for general business purposes, would have been the sum of \$750 a year.”

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He then finds, "That the value of the said leasehold estate depreciated, by lapse of time, and at the rate specified by him; and that the aggregate or total depreciation by lapse of time, was, on the 18th of June, 1856, \$796.50."

He also finds, "That the annual deterioration, from wear and tear and use of the buildings, was mostly made good, by repairs and improvements made by the defendant."

The referee then credited the plaintiff with the annual value of the property, at the rate of \$750 per annum, and not at the rate of the rents actually received by the defendant, on the ground, that the plaintiff was entitled to what would have been their fair annual value for general business purposes.

He also credited the plaintiff with the \$796.50, for the depreciation in the value by lapse of time. He debited the plaintiff with the ground rent and taxes, and the interest upon the unpaid purchase money.

The case came before the Judge at Special Term, upon exceptions and for judgment. It was held, "that the amount of \$796.50, charged against the defendant, for the depreciation of value by lapse of time, from the 1st May, 1853, to the 18th of June, 1856, was improperly allowed, upon the ground, that the defendant had already been charged with the full amount of the fair yearly value of the premises, which furnished a compensation for the yearly depreciation in value."

It was also adjudged, "that the defendant be charged, from the 18th of June, 1856, to the 1st of May, 1857, with rents actually received only."

The first of May, 1858, is the date of the first order decreeing the defendant to perform. The first of May, 1857, is the date of the final decision, on which judgment was entered on the 8th of May, 1857.

The judgment given, directed the plaintiff to pay a sum ascertained upon such basis, and awarded costs to the plaintiff, except that it directed the costs of the reference to be borne, equally, by the parties, and that no costs be allowed, to either party, upon the final hearing.

The exceptions of the plaintiff raise these questions: 1st. Of the correctness of the disallowance, by the Judge, of the \$796.50, allowed by the referee, for the depreciation of the value of the

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lease; 2d. For allowing to the plaintiff, for rent, from the 18th of June, 1856, to the 1st of May, 1857, only the sum received by the defendant, being at the rate of \$675 per annum, and amounting to \$585—and for not allowing the actual value of the use of the premises, for general business purposes, from the 18th of June, 1856, to the 1st of May, 1857, or to the date of the final judgment; and, 3d. For not allowing to the plaintiff full costs.

William A. Hardenbrook, for appellant.

Harris Wilson, in person, respondent.

HOFFMAN, J.—Cases, like the one before us, though not of frequent occurrence, present questions of considerable importance. There are few authorities which bear on the subject.

The general rule is, that a purchaser, when the contract is completed after the time stipulated, pays interest on his purchase-money, and takes the rents and profits. (*Eddale v. Stephenson*, 1 S. & St. 123.)

In *Dias v. Glover*, (1 Hoffman's Ch. Rep. 72,) it was decided, that where the vendor had caused delay without just cause, the vendee might be exempted from paying interest, leaving the vendor to take the rents. This option was given to the purchaser. Two English authorities to this effect are cited. In another case, the Court refused interest, where the vendor did not establish a title, until five years after the contract. (*Birch v. Podmore*, Seton on Decrees, 218.)

Sir John Leach, in *Paton v. Rogers*, (6 Mad. 256,) expresses the rule generally, “that if the vendor has improperly delayed the execution of the contract, and refused to give possession, he ought not to be benefited by the delay he has occasioned.”

Mr. Sugden says: “It frequently happens, that a contract for a leasehold estate is not carried into execution at the time appointed, and the vendor continues in possession. The estate, of course, daily decreases in value, and a question constantly arises, whether the purchaser shall be compelled to pay the full price agreed to be given for the estate, or what arrangement shall be made between the parties.”

He then cites the decision in *Dyer v. Hargrave* next stated, and considers that it contains a just rule.

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In *Dyer v. Hargrave*, (10 Vesey, 505,) the bill was filed to compel the defendant to complete his contract for the sale by him of a leasehold, made in 1802. The cause was heard in 1805. Various objections were made, which were overruled by the Court. When the decree was pronounced, Mr. Romilly observed, with reference to the time at which the agreement was to have been performed, that there must be some rule as to leasehold interests; that this agreement ought to have been performed three years ago; and that the purchaser could not be expected to take a term of twenty-four years at the price which he had agreed to give for a term of twenty-seven years. The cause stood over, that authorities might be found, but none were produced.

The Master of the Rolls said, "that for the time elapsed before the execution of the agreement, in consequence of the pendency of the suit, interest should be paid by the purchaser; and a rent should be set upon the premises in respect of the possession of the vendor."

It cannot admit of doubt, that this was meant to meet Mr. Romilly's suggestion, and to fix a rent by having regard to the diminished value of the lease. Rents received, would, of course, in ordinary cases, be taken by the purchaser, when he was charged with interest.

In *Hamer v. Williams*, (1 Jones and Cary, 274,) the rental under which a purchase was made, stated, that there was an outstanding lease for twenty-one years unexpired, and one life. It turned out to be for forty-one years, and several lives; and a reference was made to ascertain how much the value of the purchase was diminished.

The case of *Champernoyne v. Brooks*, is of great importance upon this subject. It is reported in 3 Clark & Finelly, 4; 4 Id. 589, and 3 Young & Collyer, 4. It was the reverse of the present case, being a delay caused by the purchaser.

I deduce from it the following propositions:—Even when a contract fixes the time for performance, the conduct of either party may disentitle him from insisting upon the adoption of that period; and may warrant the Court to assume some other date, upon questions of the payment of interest on purchase money, or of the appreciation or depreciation of the property.

When the subject of the purchase is a reversionary interest, de-

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pending, for the whole estate, upon a series of lives, or for portions upon a life or a series of lives—if the vendee, by his own fault, prevents the fulfilment, until lives drop in, and the estate be thus more valuable than at the time of the contract, the Court will not let him profit by his fault, but will subject him to a payment commensurate with his gain.

Thus far, the case of *Blount v. Blount*, before Lord Hardwicke, (3 Atk. 636,) went; and as the purchaser there had been let into possession, he was to be charged with the increase of the value in the shape of profits reaped by him. The benefit arising from the wearing away of lives was treated, in *Champernoyne v. Brooks*, as standing on the same ground as the dropping in of lives, and Lord Hardwicke's distinction was disapproved.

The Court (in the last decree, 1839) fixed upon the 20th of January, 1825, as the period of the date of the conveyance. The contract made in 1812, was, however, taken by the Court as of July, 1816, for the questions before it. The Master was directed to estimate the increased value arising from the dropping of lives between 1816 and the 20th of January, 1825. This was to be added to the balance of the purchase money; and the plaintiff (the vendor) to be entitled to interest upon the aggregate from that date. Rents and profits were to be ascertained from the 20th of January, 1825, and charged to the vendor. He was charged also with the payments made on account of the purchase money, and interest upon them.

Lord Lyndhurst, on the argument in the House of Lords, put this case:—"Suppose there is a sale of the reversion of a term, with a nominal rent; that nineteen years of the term have run out, while one of the parties has refused to execute the contract, and, at the end of that time, the decree is for a specific performance. The party would have three or four times the value of his money, on account of his own litigation."

Now, the depreciation of a leasehold by the lapse of the years of a term, is similar, as relates to the vendor, to the increase of value by the dropping or wearing of lives, to the vendee. If the fault of the vendee subjects him to the payment of an enhanced price, the default of the vendor must equally compel him to take a diminished amount.

The referee in this case did not fix the rent of \$750, chargeable

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to the defendant, with a view to the annual depreciation of the value of the lease, for he allows the extra sum of \$796.50 on that ground. The Judge, at Special Term, rejects the last item, because he assumes it is covered by the former sum.

The learned Judge cannot be considered as meaning, that, in point of fact, the decreased value was allowed for, in the extra \$100 a year beyond the rents actually received, because the referee explicitly allows this addition on another ground, and allows the \$796.50 on that ground. The Judge must be understood as meaning, first, that the extra \$100 should not have been allowed, upon the ground of the referee; and next, that the sum of \$750 per annum was a sufficient compensation to the plaintiff, in the shape of a rental comprising the element of depreciation, from lapse of time. This view disregards the amount of rents actually received, and seems to be what the Master of the Rolls prescribes in the case, from 10th Vesey, before cited.

I have no doubt, under the cases cited, that in the case of a delay in the consummation of a contract of sale, arising from the fault of the vendor, the purchaser has a right to call upon the Court to fix the period of completion as of a later day than its date; and to fix it as of the time when the vendor has conceded, or the Court has decided, that the contract should be executed; or at the time when possession has been, or could, have been taken.

But another proposition seems to me equally clear. The purchaser may also elect to treat the property as his from the date of the contract, or the time fixed for its performance. But he cannot take advantage of rules applicable to the one position, and profit also by rules applicable exclusively to the other. He cannot, for example, be considered as a purchaser at the time of the interlocutory order of 1856, upon the question of deterioration of value, or liability to interest; and as purchaser from the date of the contract, upon the question of a right to rents. He may select one or other of the periods to establish his relations; but he must abide by the one he chooses, in all its results.

To apply these principles to the present case. The purchaser, the plaintiff, had a right to say, that he would treat the contract as if it were to have been executed on the 18th of June, 1856, the day of the judgment for performance. He had no right to carry

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the question of value beyond that date, because he was at liberty, upon paying the purchase money, to have taken possession, and the Court would have given him a writ of assistance, or other adequate process.

Then the question would have been this: What was the value of the property on the 18th of June, 1856, on the basis of the purchase money, being its value on the 1st of May, 1858?

This regulates the sum to be paid, as if the contract were made on the 18th of June, 1856, at the reduced price. It then excludes interest on the purchase money, on the one side, and rents on the other. It excludes, also, all payments for taxes and repairs. In short, it takes up the case precisely as if the contract was then made, and then enforced, at the reduced price. In this view, the inquiry is, What is the amount of the reduction from the contract price? and how is that amount to be arrived at?

If we take the mere arithmetical proportion between seventeen and say, fourteen years, the difference would be \$760, upon the contract price of \$4500.

It is apparent, that the referee has proceeded upon the testimony of Albert Van Winkle, who alone seems to have reflected upon the question with a view to some principle. He makes the depreciation, for three years, \$750, upon the scale which the referee has adopted. The referee has added \$46.50 for the additional one month and eighteen days, making the sum \$796.50.

A calculation will show, that the plaintiff would have gained about three hundred dollars on this basis, adopting the decrease of value at the sum found by the referee.

But he did elect to fix the equities between him and the plaintiff upon the other footing, and must abide by it. It, then, is obvious, that had he obtained possession according to the terms of the contract, and retained that possession without material changes of the premises, for the period in question, he would have been subjected to precisely the same depreciation in the value of the lease, as is now found to have occurred.

It is, however, contended, that the plaintiff could have made extensive improvements, had he had possession in 1858, which it would have been inexpedient to make, on so large and beneficial a scale, in 1856; and that, from such improvements, a great increase of profits would have arisen.

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If this were a tenable view of the case, yet, by the agreement, the plaintiff was apprized that the whole of the first floor was subject to a lease for two years from the 1st of May, 1853, and, by his complaint, he says that the damages arose to him from his inability to fill up certain adjacent ground, on which (or on the premises in question) he intended to build after the two years mentioned in the agreement had expired.

Thus, then, this source of damage could only arise after the 1st of May, 1855, and could only exist down to the first order of reference, in the nature of an interlocutory decree, made the 18th of June, 1856. On the plaintiff's own theory, therefore, a portion only of the \$769.50 could be allowed.

But, again, in a case for specific performance, such a ground of estimate of conjectural profits cannot be allowed. It may be, that had the plaintiff sued for damages at law, they would have been given.

Upon the whole case, therefore, the claims and rights of the plaintiff, presented and insisted upon by him, have been rightly determined by the Judge at Special Term.

The judgment should be affirmed with costs.

BOSWORTH, J., without expressing any opinion as to several of the propositions discussed in the opinion of HOFFMAN, J., concurred in affirming the judgment. Judgment affirmed.

(A.)

*Statement of Referee as of the 18th June, 1856, with the Corrections
of the Judge at Special Term.*

1856.

June 18th, Defendant charged with rents	\$2350
Credited with ground rent, taxes and interest on \$4400, bal-	
ance of \$4500 purchase mo-	
ney	\$1722 94
Do. by Judge, taxes	58 37
Balance purchase money	4400 00
1856.	
June 18th, Balance due by plaintiff	3831 31
	\$6181 31
	\$6181 31

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1857.

May 1st, Further debits by Judge.

Rents	\$585 00
Costs	110 07
Credits, interest . .	\$266 94
Ground rent . . .	173 84
Taxes	69 15

Balance due plaintiff	\$509 43
	185 64

	\$695 07 \$695 07
Down	8881 81
Drawn off	185 64

Due by plaintiff	\$3645 67

*Defendant's Account.**Dr.**Cr.*

1856.

June 18th, Purchase money	4500 00
To decreased value of lease	796 50
To cash paid down	100 00
Interest from March 6th, 1853, 3812	22 98
Balance	8580 52

	\$4500 00 \$4500 00

1857.

May 1st, By balance due defendant	8580 52
“ interest to date 10 m. 12 d.	210 07
“ Ground rent and taxes, \$178 38	
69 15	242 48

To rents	585 00
“ costs	110 07
Balance	8338 00

\$3,338 00	\$4,083 07 \$4083 07

Robbins v. Richardson.

ROBBINS, *et al.*, Plaintiffs and Respondents, *v.* RICHARDSON, *et al.*, Defendants and Appellants.

When a note is made, without consideration, and for the accommodation of the payee, and is delivered to him by the maker, without any restriction as to its use, and is endorsed and delivered by the payee to the holder, as security for an antecedent debt, the latter can recover of the maker, at least, to the amount of the debt it was transferred to secure. It is no answer to an action, on such note, that the debt it was transferred to secure has not become due. If such debt has been paid, the burden of proving that fact rests on the maker of the note. A surrender of other securities, by the endorsee of such a note, as a consideration of the endorsement and transfer of it by the payee, makes the endorsee a holder for value.

When the endorsee of a note, prior to his taking the note, inquires of the maker, whether it is a business note, and such maker answers that it is, and the endorsee receives the note, and gives value, or parts with securities, in reliance upon such representation, he is entitled to treat it, for all purposes, to the extent of his interest therein, as a business note, and hold the maker to the truth of his representations.

Whether, if he so receive the note, as collateral security for the debt of the payee, the maker would be permitted to deny the truth of such representations, even to reduce the recovery to the amount of the debt for which it is held as security? *Quare.*

When such endorsee, prior to his taking the note, sends it by a messenger to the maker, with instructions to inquire, if it is a business note, and the inquiry is made, and he answers, that it is; after proof of such facts, the endorsee may prove, that the messenger, on returning, reported to the endorsee what the maker said, by any person who heard him make such report. Proof of the latter fact is material to show, that the representation made, or answer given, was communicated to the endorsee before he took the note, and such proof may be made by any person who knows the fact.

When, in an action on such a note, the answer, by not denying, admits the allegations of the complaint, that the defendant made and delivered the note to the payee, who endorsed and delivered it to the plaintiff; the defendant should not be permitted, at the trial, to amend his answer, by inserting an averment, that the payee of the note, at the time it was so made and endorsed, was a married woman. The refusal of a Judge to permit such an amendment, if he has power to allow it, is a matter resting in his discretion, and cannot be reviewed, on an exception to his decision.

To allow it, in such a case, even if the power to grant it is unquestionable, would permit a technical matter to be alleged, to admit proof of a defence not meritorious.

(Before DUNN, Ch. J., and WOODRUFF, J.)

Heard, October 14; decided, December 5th, 1857.

Robbins v. Richardson.

This action is brought by the plaintiffs, as endorsees of a promissory note, for \$1000, dated Nov. 5, 1855, at 6 months. The complaint avers the making of the note by the defendants, payable to the order of one R. C. Jones; the delivery thereof, by the defendants, to the said R. C. Jones: that the said R. C. Jones duly endorsed the said note in blank, and transferred and delivered the same to the plaintiffs.

The complaint then adds, that the note is due, and payable; that it has not been paid, and that the plaintiffs are now the lawful holders and owners thereof.

The answer, by not denying, admits the making and delivery of the note, by the defendants, to the payee, and the due endorsement, transfer and delivery thereof, by such payee, to the plaintiffs. But the answer says, "that they (the defendants) have no knowledge or information, sufficient to form a belief, whether, at the time of the commencement of this action, the plaintiffs were, or whether they now are, the lawful owners or holders of the said note."

For a second defence, the defendants aver that the note was made and delivered to R. C. Jones without consideration, and solely for her accommodation, and that it was, at that time, agreed that the note should not be put into the street to be negotiated, or sold to brokers, and that the payee promised to return the note to the defendants, at maturity. But, that the note was, contrary to such agreement, passed away to Wall street brokers, the plaintiffs in this action, and that the plaintiffs received it for an antecedent debt, and advanced no money, and parted with no value therefor.

For a third defence, the defendants aver that it was made and delivered for the accommodation of R. C. Jones, and without consideration received by the defendants, and that it was delivered to the plaintiff, by the payee, upon, and in consideration of, an agreement to forbear, and give time of payment of a sum of \$1000, then due, or to become due, to them, for which the payee at the time of the delivery of such note, paid to the plaintiff more than legal interest, to wit, a rate at least two per cent. a month, and that the agreement upon which such note was delivered, was usurious, and void.

The case came on for trial before Mr. Justice Slossen and a ju-

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ry, at the November trial term, 1856. On the trial, the plaintiffs read the note in evidence, proved the co-partnership of the plaintiffs, and rested.

The defendants gave evidence, tending to show that the payee, when she obtained the note, promised to return it within two weeks, but they, also, read in evidence, a written receipt, procured from her, after the two weeks had expired, acknowledging that the note was received for her accommodation, and promising to pay the same at, or before, the maturity thereof. This receipt was given before the note was transferred to the plaintiffs.

But the defendants gave no evidence showing, or tending to show, that the defendants imposed any restriction upon the payee, in respect to the use she should make of the note, nor that there was any agreement, or understanding, in regard to the purpose to which it was to be applied. Nor was there any evidence, proving, or tending to prove, the usury alleged in the answer.

One of the plaintiffs was examined in behalf of the defendants, and he testified to various loans made to R. C. Jones prior to January 1st, 1856, and that the balance due thereupon, on that day, was \$735.86, for which the plaintiffs held, as security, certain Texas scrip, and a promissory note, made by one Walter Mead, then past due. And that the plaintiffs, on the day last mentioned, and upon condition of receiving the note, now in suit, as collateral security, and in consideration thereof, took her note, or agreement, (which he then produced and read in evidence,) acknowledging that she had borrowed and received the \$735.86, and promising to pay the same on demand, with interest; gave up to her the said scrip, and the note of Mead, and, also, received the note in suit, instead thereof. And it was further proved, on the part of the plaintiffs, that before giving up the collateral securities, they sent the note, now in suit, to the store of the defendants, by a messenger, and inquired of them whether it was a business note, and one of the defendants, in the presence of the other, declared that it was.

On the examination of one of the plaintiffs, he was asked, what was the report brought to him by the messenger? The question was objected to, and the objection overruled. The defendants excepted, and the witness said, "The report was, that it was a business note."

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It appeared, on the examination of the plaintiff by the defendant, that he, the plaintiff, "had known Mrs. Jones and her husband ten years previously;" that he had not known any thing about him for three years past, but he said, "I have no doubt that he is now the husband of Mrs. Jones. So far as I know, he was her husband ten years ago." Other evidence showed, that R. C. Jones, the payee of the note, was a married woman, and that her husband was still living.

The defendants thereupon moved for leave to amend their answer, so as to aver that the payee of the note was a married woman, so that her endorsement and transfer conveyed no title to the note.

The Court denied the motion, and the defendants' counsel excepted.

The testimony being closed, the defendants' counsel moved to dismiss the complaint on the following grounds:—

1. That the note being an accommodation note, and transferred as collateral security for an antecedent debt, the plaintiffs could not recover.

2. That there was no evidence that the original debt had ever been demanded, or claimed, by the plaintiff, or that it had not been paid.

3. That the endorsement and transfer, by a married woman, conveyed no title, and gave the plaintiffs no right of action.

4. That upon the pleadings and the evidence, the complaint should be dismissed.

The motion was denied, and the defendants excepted.

The defendants' counsel requested the Court to charge the jury, that if they believed, from the testimony, that the note was between the defendants and the payee, without consideration, and that it was given by the payee solely to secure an antecedent debt, the plaintiffs could not recover. .

The Court charged, that the evidence clearly showed that the note was an accommodation note; but that the transfer of an accommodation note as security for an antecedent debt, gives title, in the absence of fraud, and if made before maturity;—to which the defendants excepted.

The Court further charged, that "there is no evidence in this case that the note was diverted from its original purpose. There

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is no evidence that it was given under any restriction as to its use. That if they believed Robbins, (the plaintiff,) he did give value for the note, as he surrendered collaterals on receiving it."

To each and every part of which charge, separately, the defendants' counsel excepted.

The jury rendered their verdict for the plaintiffs for \$780.80, being the amount of the note given by Mrs. Jones to the plaintiffs, with interest.

From the judgment upon this verdict the defendants appealed.

Edwards Pierrepont, for the appellants.

C. F. Sanford, for the respondents.

BY THE COURT. WOODRUFF, J.—The defendants wholly failed to prove, that there was any special agreement between the defendants and the payee, restricting the use of the note to any particular purpose, or restraining her in any wise as to the manner in which, or the persons to whom, it should be negotiated. And having given no evidence, that there was any usurious agreement, under which it was negotiated, no part of the second or third defences was proved, save, only, that the note was made, without consideration received by the defendants, for the accommodation of the payee, and that it was transferred to the plaintiffs, as collateral security, for moneys previously loaned by the plaintiffs to such payee. In the endeavor to prove, that it was transferred, as such collateral security, the defendants also proved, that, although given as such security, the plaintiffs, in consideration thereof, surrendered to the payee other securities theretofore held for the same indebtedness. This was clearly a parting with value, upon the faith of the note in suit; and if giving value was necessary, to entitle the plaintiffs to retain the note, as such security, and recover thereon, it was sufficient. The surrender of securities is giving a valuable consideration, as truly, as the giving of money on the faith of the note.

In this respect, we say, unhesitatingly, that the charge of the Judge to the jury was correct, and had the case been submitted to the jury, upon this point alone, the second and third defences must have failed; for the evidence, to the effect stated, was wholly

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uncontradicted, and we see nothing in the case to warrant the jury in disregarding, or even doubting it.

Besides this, the proof was, in like manner, clear and uncontradicted, that the plaintiffs took the note, in reliance upon the representation of the defendants, that the note was a business note. The plaintiffs had a right to rely upon that representation, and to deal with the note, in all respects, as if such representation was true; and if the title, which was either admitted in the pleadings, or proved on the trial, was such as would have entitled the plaintiffs to recover, had the note been given for value received, the plaintiffs were clearly entitled to recover here.* And we think the Judge would have ruled correctly, if, upon proof, that the note was received and collateral securities surrendered, in reliance on the truth of such a representation, the evidence, that the note was an accommodation note, should, so far as the right of recovery was concerned, be wholly disregarded. If the defendants had a right to give such evidence at all, in the face of their representation, it was only to restrict the recovery to the sum for which the plaintiffs held it as security, and even that may be doubtful. (*Crane v. Hendricks*, 7 Wend. 569.)

Under such circumstances, we think it was not necessary, for the purposes of this case, to consider the question, whether the transfer, by the payee, of an accommodation note, as security for an antecedent debt, without fraud, and before the maturity of the note, gives title. We are, nevertheless, equally clear, that the charge was correct, on this point also.

We regard it as fully settled, that, where a note is made for the accommodation of a payee, and delivered without any restriction or limitation of his authority to use it, he may appropriate it to such uses, (being themselves legal,) as his convenience or pleasure may dictate; and the holder is not bound to prove, that he parted with value, as the consideration of the transfer to himself. He may recover thereon, although he received it in payment of a pre-existing debt, or received it as collateral security for such an indebtedness. Indeed, mere proof, that a note is an accommodation note, is not sufficient to cast upon an endorsee the burden of showing, upon what consideration he did receive the note. He may rest

* *Benedict v. Coffey* (5 Duer, 237); *Burrell v. De Groot* (Id. 383).

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upon the consideration which the endorsement to himself legally imports. Although some misapprehension has formerly existed, upon this point, it is now, we think, too firmly settled to be open to discussion. (*Lathrop v. Morris*, 5 Sandf. S. C. R. 7; *Grandin, et al., v. Le Roy*, 2 Paige, 509; *Bank of Rutland v. Buck*, 5 Wend. 66; *Grant v. Ellicott*, 7 Wend. 227; *Young v. Lee*, 2 Kern. 552; *Ross v. Bedell*, 5 Duer, 467, and cases cited.)

There was, therefore, no error in the charge to the jury, and the Judge properly refused to charge as requested by the defendants.

We are no less clear, that it was unnecessary for the plaintiffs to prove a demand of payment from Mrs. Jones, the payee. Indeed, this seems to follow, from what has already been said. They were (so far as relates to this point) the lawful holders of the note, for a sufficient consideration, not defeated by the proof, that the note was an accommodation note. Establishing their title to the note, established their right to recover thereon, according to its tenor.

But in no aspect of the case was such a demand necessary. The transfer to them was not dependent upon any condition precedent, viz., to become available, in case the note of Mrs. Jones was not paid, on demand, or provided, on demand, payment should be refused. In reference to this question, their title was precisely the same, as if the note had, in fact, been given to the defendants for full value. They had a right, and, in the last case supposed, it might, perhaps, have been their duty, to require the defendants to pay the note, when it became due. True, if the note of Mrs. Jones had been paid, she would have been entitled to a return of this note; but the burden of showing, that the plaintiffs' title had been defeated, was upon the defendants.

In relation to the admission of the evidence, that the plaintiffs' messenger reported to the plaintiffs what the defendants said, in answer to the inquiry, whether this note was a business note; there was no error. The objection is, that the evidence was hear-say, only.

It was competent, and it was deemed material, to prove, that the defendants, by representing, that the note was business paper, had induced the plaintiffs to deal with it as such, and surrender other securities. For this purpose, it was necessary to prove two things: First, that the representation was made; and second, that the plaintiffs had acted upon that representation. The plain-

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tiffs proved, by the messenger, that the defendants made the representation; but, had they stopped there, this ground of claim would not have been established. They must prove, that the representation was communicated to them by their messenger; otherwise, it could not have been acted upon. Whether this was proved by the messenger, or by any other witness, was wholly immaterial. This seems, to us, too plain to require further discussion. It was not attempting to prove the defendants' representation by what a third person (the messenger) said; but it was giving direct and positive proof, that what the defendants said (which had already been proved) was communicated to the plaintiffs.

The remaining questions are: First, whether, under the pleadings, the plaintiffs' title could be defeated by proof, that the payee of the note was a married woman? and second, whether the Judge should have permitted the defendants to amend their answer, so as to set up that specific defence?

The answer of the defendants, by not denying, admitted, (Code, § 168,) that they made the note in suit, and delivered it to the payee, and that "the said payee, the said R. C. Jones, thereupon duly endorsed the said note, in blank, and transferred and delivered the same to the said plaintiffs."

The fact of endorsement, that it was duly made, and that the note was actually and, of course, legally transferred to the plaintiffs, here stand admitted. Whether the plaintiffs continued to be the holders and owners, at the time of the commencement of the suit, may, perhaps, be deemed put in issue, by what follows in the answer; but the regularity and validity of the transfer of the note to them is not put in issue. Certain facts are afterwards alleged, as second and third defences, which have already been noticed; but there is no intimation of a want of legal capacity in the payee to endorse or transfer the note.

We say, unhesitatingly, that, under such an answer, the defendants were not at liberty to prove, that no transfer had been made to the plaintiffs; nor to do indirectly, by showing, that the payee had no capacity to transfer, what they would not be at liberty to do directly. In truth, the fact of due endorsement and transfer to the plaintiffs was not in issue.

It is settled by the Court of Appeals, that a defence which is

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not set up in the answer, will not avail a defendant, although it is proved on the trial. (*Field v. The Mayor*, 2 Seld. 179; *Brasill v. Isham*, 2 Kern. 1.)

It is eminently just, that this rule should be adhered to. A plaintiff comes to trial prepared to meet the defences upon which the answer assures him the defendant will rely, and presumptively prepared to meet none other. It is true, that he may object to proof of any other defence; but it is also true, that in the course of the trial facts may, and frequently they do appear, in some form or process of examination, or cross-examination, which are so connected with the *res gestae*, or, proper as a means of testing the memory or credit of the witness, that they could not be altogether excluded, and which suggest, that, had they been set up by answer, might defeat the action. But the plaintiff was not bound to bring witnesses to contradict them. In this way, even payment might be testified to by some witness; or, in an action for assault and battery, in which the answer contained nothing but a denial, a witness called by the defendant to mitigate damages, might state facts, as a part of the *res gestae*, which, if true, would amount to a complete justification.

Second. Ought the Judge to have permitted an amendment? Whether the propriety of granting the amendment did not rest so fully in the discretion of the Judge presiding at the trial, that the refusal to allow it cannot be reviewed on appeal, has been already twice considered in this Court, in General Term, and it is held, that such a refusal furnishes no ground of exception, and will not be reviewed. (*Brown v. McCune*, 5 Sandf. 229; *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer, 489; and see *Roth v. Schloss*, 6 Barb. 308.)

In the present case, the considerations above suggested, in regard to the right of the defendant to prove a defence not set up in the answer, bear also upon the propriety of allowing the amendment. The motion was not made, to prevent a variance; it was sought to introduce an entirely new defence—a defence that was contrary to the admissions in the answer—a defence not in itself meritorious, but resting, so far as concerns this case, upon purely technical grounds; for if, in fact, the note in question was without consideration, the husband had no beneficial interest in it—it could never be collected for his benefit—he was in no

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wise prejudiced by suffering the plaintiff to recover, or by requiring the defendants to pay according to the very terms of their promise, *i. e.*, to the party whom the payee should appoint.

The cases of *Egert v. Wicker*, (10 How. Pr. R. 193,) and *Callin v. Hansen*, (1 Duer 309,) show that an amendment introducing a defence, new and substantial, ought not to be allowed at the trial.

We do not, therefore, deem it necessary to inquire whether, under the circumstances disclosed on the trial, the defence would have availed to defeat a recovery. The general doctrine, that a promissory note, made during the coverture, payable to a married woman, and having no connection with her separate property, is, in legal effect, payable to her husband, we do not question; nor, that she cannot transfer such a note, by endorsement, without her husband's authority. But there are circumstances in which the title of an endorsee of a note, payable to her, and transferred by her endorsement, will be sustained. (*Miller v. Delamater*, 12 Wend. 438.)

The judgment should be affirmed.

Judgment affirmed.

**JENNY GRAY, Plaintiff and Appellant, v. FANNY LESSINGTON,
Defendant and Respondent.**

Whether an infant can bring an action during her minority, to rescind a purchase made by her of personal property, and to obtain a surrender of promissory notes and a chattel mortgage of such property made and executed by her, for, and to secure, payment of the contract price? *Quare.*

When, in an action to rescind, she bases her right of action on the fact of her infancy at the time of making the contract, and on the further fact, that the defendant fraudulently misrepresented the value of the property, and imposed upon the plaintiff's inexperience, the burden of proving misrepresentations made, and imposition practised, is upon the plaintiff.

Upon the question of good faith, as to the representations made of its value, it is competent for the defendant to show that, shortly previous to such sale, the defendant bought and paid for it, at the prices represented by her to be its value. The terms, on which a rescission will be allowed, are a restoration of the property to the defendant, and the payment of such sum as, with the payments made on account of the purchase, equals the deterioration of the property in value, caused by the plaintiff's use of it.

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When the value of the property at the time of the infant's purchase of it, upon the evidence given, would appear to exceed very greatly its value at the time it was restored to the defendant, or was offered to be restored, and it becomes a fair subject of inquiry, whether this difference in value results from a misuse of the property, or whether its value, at the time of the infant's purchase, is over-estimated, the uses to which it has been put by the infant is a proper subject of inquiry.

When such property has been sold, *pendente lite*, by a receiver appointed by the Court, the plaintiff is to be allowed, as the value of the property when it went into the hands of the receiver all that it sold for, though that sum may exceed its value as established by the testimony given upon that point. If it sells for less, the defendant is, nevertheless, to be deemed to have taken possession at the time it went into the receiver's hands, and the contract being rescinded, is to be charged with such sum, as its value, as the evidence shows it was then worth, and takes the proceeds of the sale, as a substitute for the property in the condition it then was.

(Before DURE, Ch. J. and WOODRUFF, J.)

Heard, October 15; decided, December 5, 1857.

THE plaintiff, by her complaint, alleges a sale on the 18th of July, 1854, to herself, by the defendant, of sundry household furniture and chattels, for the price of \$5425, and the execution and delivery by the plaintiff to the defendant of certain promissory notes, and a mortgage to secure the payment of the purchase money. That the plaintiff has paid upon the said notes and mortgage the sum of \$2580. That the plaintiff, at the time of the said purchase, and at the commencement of this action, was an infant. That the defendant, knowing such infancy, took advantage of her youth and inexperience, to defraud her, and falsely represented the said furniture and chattels to be worth the price at which the defendant so sold the same, well knowing that the same were not worth over \$2000, or, at most, \$2500. That, in truth, the property was not worth more than \$2000; and that the payments already made, amount to more than the value of the property when so sold, or at the time of bringing the action.

That the defendant is irresponsible, and that she threatens to foreclose the mortgage and take possession and sell the property.

The plaintiff therefore prayed that the contract of sale be rescinded, on account of the infancy of the plaintiff, and be set aside; that the mortgage and the unpaid notes be cancelled, and the defendant be adjudged to repay the whole amount received on the said sale, deducting only whatever the deterioration in value

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of the property may be, by reason of its use by the plaintiff, upon the plaintiff's restoring the property to the defendant; or that the mortgage and notes be cancelled and the plaintiff be declared the absolute owner of the property, the contract of sale and delivery being allowed to stand so far as executed, with the further prayer for an injunction and receiver.

The answer admits the fact of sale, etc., but denies all the facts alleged by the plaintiff as grounds for the relief sought, and alleges that the property, by the careless and negligent conduct and want of care on the part of the plaintiff, etc., has been irreparably injured, and deteriorated more than one-half in value.

The action was tried at the Special Term, in October, 1856, before Mr. Justice Bosworth, without a jury. Although the orders and proceedings intermediate the bringing of the action and the trial, for the appointment of a receiver and the sale of the property, are not set out in the case submitted on the appeal, it nevertheless appears to have been assumed on the trial and by the finding of the Judge, and in the judgment, as it was on the argument of the appeal, that a receiver had been appointed, and the property sold by the receiver before the trial, and that he held the proceeds, subject to the decree of the Court in this action.

The Judge who presided at the trial has found, that the plaintiff was an infant at the time of the purchase and at the commencement of this action, but that the defendant had neither knowledge nor notice thereof. That the price of the property was not an unreasonable one, considering all the circumstances under which the sale took place, and the terms thereof. That the defendant did not impose upon or deceive the plaintiff to induce her to make the purchase, nor fraudulently misrepresent the value of the property.

He therefore finds the value at the price agreed to be

paid	\$5425 00
The value, at the time the action was commenced, he finds to be	1817 77
And the depreciation in value therefore	\$4107 23
And the amount already paid upon the purchase money	2389 00
And the amount requisite to make good the deficiency	\$1518 23

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He further finds, that the plaintiff did not offer to return the property before bringing the action.

Upon these facts, his conclusions of law are:—

That the plaintiff had a right to elect, by a suit properly brought, during her minority, to rescind the contract. That, after an election to disaffirm, she was not entitled to an injunction to restrain the defendant from taking possession. That the plaintiff is, in equity, entitled to rescind, only, upon the terms of restoring the property, and paying such sum as, with the amount already paid, will make good to the defendant the depreciation resulting from her use of it.

Judgment was directed in accordance with these rules, declaring the contract of sale rescinded. That the mortgage and unpaid notes be delivered up, upon the payment, by the plaintiff to the defendant, on or before the first day of July then next, of \$1518¹¹/₁₂. The decision of the Court then declared, that a judgment to the effect stated is equivalent to allowing the plaintiff, by way of deduction, from the price she agreed to pay, the difference between the net proceeds of the property sold by the receiver and its actual value at the time he took possession of it, and also the interest which had accrued in favor of the defendant, upon a statement of an account of the contract price and the payments thereon.

In default of the payment of the said sum of \$1518¹¹/₁₂ and interest, and the costs of the action, the complaint was ordered dismissed with costs.

The plaintiff appealed to the General Term.

A. R. Dyett, for the plaintiff, appellant.

Jas. T. Brady, for the defendant, respondent.

BY THE COURT. WOODRUFF, J.—The principal grounds upon which it is insisted that the judgment herein should be reversed, are, that the various findings of the Judge, at Special Term, are without evidence, or against evidence.

We have examined the evidence with care, and in connection with the views of the plaintiff's counsel, as given us on the argument, and submitted in the points.

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The burthen of showing that the plaintiff had been deceived, or defrauded by false representations respecting the value of the property, was upon her. No witness testifies that the property was, at the time of the sale, worth less than the price at which it was sold to the plaintiff. Some of the defendant's witnesses testified, in relation to the great bulk of the articles, and their value, at a time shortly before the sale, and their testimony tended to show that the property was not over-estimated. On the other hand, the plaintiff's witness testified to the value when the receiver took possession, and one of them stated, that at that time (nearly two years after the sale) the property would not be worth, if new, over \$2635.54. Under such a state of the proofs, we cannot say that the finding of value is against evidence. The proofs may not be so clear and convincing as to admit of no doubt. We are free to say it is not. And the very large depreciation which results from the value found, would at first view seem incredible. But even this, the Court might, and no doubt did, consider sufficiently explained by the evidence, showing the purposes for which the property had been used by the plaintiff, and the usage to which it had been subjected by the rough, noisy and riotous men who frequented the plaintiff's house, and the destruction which they are testified to have caused.

The price of the sale being found reasonable, and there being an entire failure of any affirmative evidence, (other than such as related to value,) showing, or tending to show, fraud or misrepresentation, or improper influence of any kind, to induce the plaintiff to purchase the property, the amount of depreciation was a necessary arithmetical result, from the further proof given, on the part of the plaintiff herself, that the property, when taken possession of by the receiver, was worth only the sum which the Court have found.

Upon the fact so found, the principle of the decision is not, as far as we understand, sought to be impeached by the appellant. Indeed it is in precise accordance with the prayer of the complaint itself. That prayer proposes to charge the plaintiff, on a rescission of the contract of sale, with the deterioration in value of the property by reason of its use by the plaintiff; and this was done by the Court. The prayer of the complaint proposes a restoration of the property to the defendant; and this was done. And

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the plaintiff is allowed the full value of the property when the possession was delivered to the receiver, without any abatement.

It is quite true, that the application of the principle of the decision to the facts, did not, result so favorably to the plaintiff, as it would, had the facts been proved as alleged; but that is not because the plaintiff has sought relief upon an erroneous principle, but because she failed to prove a state of facts, which would produce a favorable result. Obviously, if the deterioration in value had not exceeded the sums which she had already paid, it would, upon the principle of the decision, have only remained to cancel the outstanding obligations, and direct the delivery of the property, or its proceeds, to the defendant.

The seeming hardship of requiring the plaintiff to pay a still further sum, as a condition of rescinding the contract, is only a necessary result of the same rule, which, under other circumstances, would have required no payment from her whatever, and might, perhaps, have permitted her to reclaim what she had paid.

We have no doubt of the correctness of the rule. At law, the infant might successfully have defended an action upon her notes. But, even at law, she could not recover back what she had paid, without restoring the whole consideration, either in specie, or by a full equivalent.

And when it becomes necessary for her to go into a court of equity, to cancel her obligations, or regain the pledge given for their performance, seeking equity, she must do equity. Making full satisfaction for the deterioration of the property, arising from its use, is doing no more. Presumptively, she has derived from the use of the property a profit, or benefit, equivalent to such deterioration. Whether that presumption is, under all circumstances, conclusive, it is not necessary to say, since there is nothing in this case to rebut the presumption. The deterioration here, is found to have resulted from the use which she has enjoyed; and if it resulted from an abuse of the property, the plaintiff's equity is no greater. In a case in which the property to be returned is shown to have depreciated in value from other causes, the inquiry may be, what benefit, if any, has the infant derived from the property, and that only may be chargeable; unless, in such case, the impracticability of restoring the defendant to the con-

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dition in which she was, before the sale, would be a reason for not interfering to give any relief.

We think, therefore, that the decision, making it a condition that the plaintiff restore the property, with all the benefit presumptively derived from its use, which, in this case, is regarded in the complaint itself, as well as the decision, as the deterioration arising from such use, was correct, and in accordance with well-settled principles. (7 Hill, 110; 17 Barb. 428; 11 Paige, Ch'y R. 107; 2 Id. 191; 3 Sandf. Ch'y, R. 431; Story on Conts. §68, and cases cited.)

A doubt may exist upon the question, whether the infant can herself elect, before she arrive at her majority, whether to affirm, or disaffirm her purchase. Her contract was not void. She could affirm it when she became of age, or elect to disaffirm it. But that it is, upon the proofs in this case, for her interest to rescind, is not questionable. And no exception is taken to the ruling, in her favor, on that subject.* Besides, we find on recurring to the evidence, that, although she had not attained to full age when the action was commenced, the Court gave her two months, after attaining her majority, within which, to elect, whether to affirm or rescind. So that, in this respect, no duty of the Court, in protecting the rights of infants, was left unperformed.

It remains to consider the plaintiff's exceptions to the rulings of the Court, in receiving and rejecting testimony.

The defendant's counsel, with a view to show or to account for the great deterioration in the property, arising from its use, inquired of one of the witnesses, for what purpose the house was occupied while the witness resided with the plaintiff (viz., about sixteen months)? We need hardly say, that the purposes to which a house is devoted, may tend directly to account for the injury and depreciation resulting therefrom to its furniture. The Court could not know, on the objection being taken, what the answer to the question would be, and, therefore, so long as the Court could see that a house might be occupied for some purposes which would manifestly tend to cause an injury to the furniture, or account for an extraordinary deterioration, of which evidence already appeared, the question should be allowed. Whether the immediate answer to the question showed a purpose which would

* Parson's Merc. Law, p. 4, and *Vent v. Osgood*, 19 Pick. 572.

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of itself tend to thus injure and impair the value of the furniture, we are not able to say, but the answer was not objected to, nor made the ground of renewed objection to the question, and the question, as put, was proper. The further answer of the witness, in relation to the conduct of the visitors at the house, was clearly competent.

The questions, what the defendant paid for the furniture which she purchased from one of the witnesses, Stover, and what was its value, were both objected to. First, that the cost was no proof of its value, and second, that the property was not sufficiently identified as the furniture in question.

On the question of the identity of the furniture, there was enough to warrant the submission of that very question of fact to the Court, and that warranted proof of the value which would become material, if the Court was satisfied of such identity. It was furniture of the same general description, in the same house, in the possession of the defendant shortly before the sale, and she had apparently sold the entire furniture of the house she had theretofore occupied, to the plaintiff. There was a just and fair presumption, that the furniture was the same.

As to the evidence of its cost, it should be borne in mind, that the defendant was charged with falsehood, fraud and misrepresentation in relation to the value of the property. On a question of fraud, it is clearly competent to show that the party charged had, very shortly before the sale, purchased the property at prices corresponding with her representation of value. Whether it is any proof of actual value or not, it is some evidence of good faith.

What has been said in regard to the identity of the property, and to the charge of fraud, applies also to the objection to the testimony of another witness, (Parker,) who testified to the sale of other articles of furniture. If there were particular articles in the bill of sale produced, which on the face of the bill appeared not to be part of the furniture in question, that furnished no reason for excluding the whole bill. The objection was not pointed to particular items, and the Court must, of necessity, in the application of the evidence, discriminate between the items.

On the examination, one of the plaintiff's witnesses had testified to the value of the property, and that \$1317.77 was the fair value when it was delivered to the receiver; and he had also tes-

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tified, that the furniture was sold at public auction for all that it was worth, and the case then states, that "the defendant objects to evidence of how much it sold for, and the Court sustains the objection."

If there were no explanation of this ruling to be gathered from the other parts of the case, it would seem liable to this criticism, that, inasmuch, as the plaintiff was to be charged with the whole deterioration in the value of the property, and the proceeds of the sale were to be paid over to the defendant, it would follow, that if the actual proceeds of the auction sale were larger in amount than the estimated value when the receiver took possession, which was taken into view in ascertaining the depreciation, the amount at which the property actually sold should have been credited to the plaintiff instead of such lower estimate of value; it would not be just to permit the defendant to receive the larger sum in actual cash, and then test the deterioration by the lesser sum at which the value was estimated. The property could not, for the purposes of this account between the parties, be deemed worth less than it actually produced on the sale.

The obvious justice of this criticism, and also the fact that no such point appears to have been specifically taken at the trial, and that we find no such view of this question in the points of the appellant, plainly suggest that it was perfectly understood (though no formal admission appears, in this case as made up) that the proceeds of the sale did not exceed the valuation of the witness, and that the whole trial proceeded upon that concession. That this was so, appears from the decision of the Court above recited, in which it is declared that the judgment allows to the plaintiff, by way of deduction from the price she agreed to pay, the difference between the net proceeds of the property, sold by the receiver, and its actual value at the time he took possession. Of course, then, the amount of such proceeds was less, and not more than such value; or, in other words, she was, in fact, allowed more than the amount of the proceeds.

It is, therefore, clear, that the plaintiff was not seeking to prove, that the property sold for a greater sum than was, in fact, allowed therefor to the plaintiff.

No doubt, the plaintiff sought the evidence, as a part of her endeavor, to depreciate the value of the property, as much as possi-

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ble, for the purpose of insisting upon the evidence, as tending to show, that the sale to her was made upon a gross and fraudulent over-valuation.

The question which was put to the witness, and upon which the Court made the ruling, is not stated in the case. It seems to us, that the subject had already been exhausted so far as the witness was concerned. He had stated the value according to his judgment, at \$1317.77, and that it sold for all it was worth. So far, the testimony was not objected to, nor rejected. It was the plaintiff's witness; as to her he must be taken to have testified truthfully, and if so, the question, how much it sold for, was already answered, viz., \$1317.77.

We are aware that this latter suggestion is inconsistent with the evident concession already mentioned, that, in truth, the property sold for less.

But it is equally clear, that if proof that it sold for less was to be taken as evidence that it was worth less (when it came to the receiver's possession) than the witness had stated, and the sum allowed, the plaintiff is benefited rather than prejudiced by the exclusion of further inquiry. For if by showing a sale for less, the plaintiff would have shown that the property was worth less than was allowed to her therefor, then clearly she would have been chargeable with a larger sum for deterioration.

But, laying aside all speculation and conjecture in regard to the subject, into which we have been drawn by the singularity of an objection to the witness' naming the amount of the proceeds in dollars and cents, we cannot perceive, in the connection in which the ruling stands, but that the witness had answered the question. When he stated that the value of the property was \$1317.77, at the time the receiver took possession, and that it sold for all it was worth, he had given the Court to understand, that it sold for \$1317.77, unless it is possible, that in the interval a further depreciation had taken place. This may, perhaps, be the real explanation of the obscurity which we find. It might be very true, that the property, when it came to the hands of the receiver, was fairly worth the sum named, and yet, at a subsequent sale, have, to some extent, further depreciated.

It was not competent, for any purpose, to show such further depreciation. If the property, when the plaintiff surrendered it,

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was worth \$1317.77, no subsequent value, and no subsequent sale, could tend to show that the price at which it was sold to the plaintiff, by the defendant, was unreasonable, or founded on a false valuation.

In the argument upon the facts, it was suggested, that a picture of Washington, mentioned in the testimony of the witness Vultee, had come to the possession of the defendant, and yet, that no allowance had been made to the plaintiff for it; and her possession of the picture was admitted.

We find nothing more in the testimony on the subject. No such picture is mentioned among the property sold and mortgaged, in any terms, by which we can say it formed any part of the sale in question. There is no evidence in regard to its value, and no point upon the subject appears to have been presented to Court at Special Term. We think that the proof in regard to the picture, is so incomplete and unsatisfactory, that we cannot say that the plaintiff ought to have had any further allowance.

We think that there are no sufficient grounds for disturbing the judgment. It must, therefore, be affirmed.

Judgment affirmed.

SHELDON, *et al.*, Plaintiffs and Respondents, *v.* WOOD, Appellant.

The objection, that there is a defect of parties, must be taken by demurrer, if the defect appear on the face of the complaint. If it do not so appear, it must be taken by answer, or it is waived, and cannot be started, on an appeal from the judgment. Although all persons, who might, properly, be, have not been made parties, and that appears at the trial, the Court may decide the controversy between those before it, when it can do so, without prejudice to the rights of others, or by saving their rights. The mere fact, that the rights of a defendant, who has not taken the objection by demurrer, may be prejudiced, is no ground for reversing a judgment, upon that objection being first taken on an appeal from the judgment. *Held*, on the facts of this case, that the defendant could not be prejudiced, by having the action determined on its merits, without other persons being made parties.

When two persons agree to unite in prosecuting a trading adventure, at their equal profit and loss, and, with a view thereto, one agrees to sell and convey, at its cost to him, one-half of a vessel to the other, and, by fraud, procures a settle-

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ment of the adventure, in which he is allowed a sum much larger than such cost price, as being its true and actual price, the defrauded party, on allegation and proof of the fraud, may recover back the excess so paid; and such a cause of action is assignable, so that the assignee can, under the Code, sue in his own name.

So if, in such settlement, one fraudulently procures the allowance to himself, as and for the cost of goods purchased for such joint adventure, a sum greater than the price paid by him for such goods, the defrauded party is entitled to open the settlement, and recover the amount which, upon a rectification of the erroneous charges, may be due to him, and such a cause of action is assignable.

On the 18th of March, 1853, on a trial, in the City of New York, commenced before referees in December, 1851, and adjourned, from time to time, till that day, the deposition of a witness residing in Buffalo was offered in evidence by the plaintiffs; and the evidence of the inability of the witness to attend, was the testimony of his son, to the effect, that "he was in the city in April, 1852, to be a witness in this case; that he was then in feeble health, and was detained at Utica by sickness, on his journey home, and that he was here again in September, 1852, in the hope that it would benefit his health; that he returned home much weaker, and, since, has been unable to make a journey; that his complaint is consumption; that a week prior to said 18th of March, when the son left Buffalo, the witness was very feeble, unable to get out of his house, or to sit up all day, and that the family scarcely expected him to live, from week to week;" and, without disposing of the question, the referees adjourned to the 10th of May, 1853, when the deposition was again offered and received, against the objection, "that the evidence of the witness's inability to attend, is insufficient." Held, that the evidence, on that point, was sufficient, to entitle it to be read on the day it was first offered, and proved sufficiently, from the nature, extent and duration of the illness of the witness, his inability to attend on the 10th of May, when it was finally offered and received.

When under a statute, authorizing the deposition of a witness to be taken before a Judge, out of Court, and which requires, that the deposition "shall be carefully read to, and subscribed by, the witness," the Judge, taking it, certifies, that "it was read to the witness," the deposition will not be excluded at the trial, because the certificate does not state, that it was "carefully" read. The Court will presume, under such circumstances, that the officer performed the duty properly, which the statute enjoins, before he made his certificate. Under 2 R. S. p. 398, art. v., entitled, "Of Proceedings to Perpetuate Testimony," a Judge of the Supreme Court may order a deposition to be taken before the County Judge of Erie County, in an action pending in this Court, the witness to be so examined then residing in that county. Such County Judge could have made the order, on an application to him therefor.

The fact, that the affidavit, on which the order was made, is entitled in the Supreme Court, does not make the order and the deposition, taken under it, nullities, if the affidavit correctly describes the Court in which the action was pending, in which it was designed to be read, and is sufficient in other respects.

This part of the title, and similar matter in the title, of the deposition, may be rejected, as surplusage, being unnecessary and immaterial.

The objection, that portions of a deposition are hear-say evidence, cannot be raised

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on appeal, if not taken at the trial. So of objections to the admissibility of a deposition, when none were made on the trial.

When particular objections are made to the reading of a deposition, and properly overruled, the party taking them cannot start other objections on the argument of the appeal, if of such a nature that they might have been obviated, if taken at the trial.

So, when on the trial, the party sufficiently proved the absence of a witness, whose deposition he offered to read, and the adverse party objected, generally, to the reading of the deposition, without stating any ground of objection, and the referees adjourned without deciding the question, and, on the adjourned day, the deposition being produced, the general objection was renewed and overruled, the party objecting cannot, on the argument of the appeal, start the specific objection, that, for aught that was shown on the adjourned day, the witness may have returned to the city, when it is obvious, that no such ground of objection was intimated on the trial, and the question of admissibility was treated by the parties, as well as by the referees, as standing precisely as it did when it was raised.

If, in taking depositions, *de bene esse*, or under a commission, there be defects in the mere form of the officer's certificate, which can be remedied on a return of the deposition, or of the commission and deposition, to him to be corrected, or if there be other defects of form, which can be remedied by re-examining the witness, a party intending to object, on the ground of such defects, must move to suppress the deposition, if there be ample time, before the trial; and, if he fail to do so, they will be disregarded, if not made until the trial.

It is discretionary with the Court, or referees, to permit a witness to be re-examined, after he has left the stand.

Parol evidence of the contents of a letter may be given, after proving it in the defendant's possession, and proper service of a notice on him to produce it, and his refusal to do so.

The defendant, in his answer, having alleged, and having given evidence tending to show, that a house and lot, conveyed to him by the plaintiffs' assignor, in part payment of the vessel, was fraudulently over-estimated and misrepresented to him, to his damage, evidence, by the plaintiffs, of its actual cost, at a period shortly anterior, is admissible, on the question of fraudulent over-valuation.

So, proof of the market value of the vessel was admissible, as an item of evidence, the defendant alleging, and having given evidence with a view to prove, that her market value was equal to the sum at which he had sold her.

When a case, on appeal, states, that an entry in a book was offered to be proved, and the counsel "agreed, that the entry shall be considered proven, as stated, and, if admissible, shall be received when passed upon by the referees, and that the counsel for the defendant have his proper exceptions to the entry," and this is all that the case discloses in relation to it, it will be presumed, that the referees were not subsequently asked to rule in respect to the matter, and the entry will not be treated as being a part of the evidence given on the trial.

When, in a suit for an accounting, notwithstanding a previous settlement of the same matters, on the ground of fraudulent misrepresentations and over-charges, the referees sustain the action, but, in stating the facts found by them, do not state, in terms, that the representations and over-charges, which they find proved, were fraudulent, the judgment will not be reversed for that cause, if,

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on all the facts found, the necessary legal conclusion is, that they were fraudulent, or if they would entitle the plaintiff to the relief actually granted, though there was no actual fraudulent intent.

When the complaint, in such an action, alleges, generally, the fact of fraudulent over-charges, and specifies some, without professing to specify all, and, on the trial, some not specified in the complaint, are proved, without any objection being taken to such proof or investigation, the Court will not listen to the objection, that such over-charges are not specified in the complaint, if first raised on an appeal from the judgment.

A defendant is not at liberty to give evidence, on the trial, of items of set-off, or counter-claim, when no such defence is alleged in his answer. An averment, that, since the settlement, which the complaint seeks to avoid, to the end, that an accounting may be had, the defendant "has discovered a large amount of indebtedness (from the other party to such settlement) to him, of which he was then ignorant," not specifying of what it consists, or how it arose, is not such a specification of a counter-claim, or set-off, as will make evidence of it admissible.

When the decisions of referees on questions of law are correct, and their conclusions of fact are so supported by the evidence, that the Court is not at liberty to set aside their report, as being contrary to evidence, there is nothing on which to base the proposition, that the report should be set aside, on account of their undue bias and partiality, when no extrinsic facts are shown, or even alleged, which would warrant even a suspicion of such bias or partiality.

(Before DUNN, Ch. J., and WOODRUFF, J.)

Heard, Oct. 7, 8, and 9; decided, Dec. 12, 1857.

HENRY SHELDON, George E. Byxbie, William Henry Sheldon and Levi Chesnutwood are the plaintiffs in this action, and Fernando Wood is the defendant. It comes before the Court, at General Term, on an appeal taken by the defendant, from the judgment therein, which was entered on the report of referees, to whom it was referred, to hear and determine the same.

The plaintiffs herein sue as assignees of Edward E. Marvine. They claim to recover a balance, alleged to be due, from the defendant, upon a true statement of certain accounts relating to a joint adventure to California, made by Marvine and the defendant, in the fall of 1848, which account was settled between them on the 3d of January, 1849.

The plaintiffs allege, that the one-half of the vessel was purchased and paid for, the adventure begun, and the settlement was made by Marvine, under the influence of misrepresentations in respect to the cost of the vessel employed in the adventure, and also in respect to the cost of the outfit of the vessel, and that

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portion of her cargo which was purchased by the defendant. They charge falsehood, misrepresentation and fraud, and claim to recover for the excess, which they allege the defendant received from Marvine, beyond what he was justly entitled to, alleging an original advance to Marvine, under an agreement, that his interest in the adventure should be pledged to them as security; and also; a subsequent assignment, before suit, by Marvine, to the plaintiffs, of all claims and demands he had, or might have, against the defendant, for the moneys and property due from the defendant, or obtained by him from Marvine.

The answer denies all charge of falsehood, misrepresentation or fraud; avers that whatever errors or inaccuracies there are in the accounts, were made by the defendant's clerk, or by Marvine himself, in making up the accounts rendered, and that they happened without his knowledge; avers a settlement since the errors were discovered, and a tender of the amount then found due; alleges failure of performance of his agreement, on the part of Marvine, in respect to a house in Murray street conveyed, in part payment, to the defendant, and that Marvine omitted to render the assistance which he was bound to render in purchasing cargo and dispatching the vessel; denies that the vessel was to be contributed to the adventure by him at her cost, and alleges that she was worth the sum of which Marvine paid the one-half; states that the title to the house and lot was not perfect, and that this required him to expend money, and that Marvine collected the rent thereof beyond the date to which he was entitled.

The answer further alleges, that if any assignment has been made by Marvine to the plaintiffs, it is simulated and false, and made to enable Marvine, who is the real and only party in interest, to testify in his own cause, and that the plaintiffs have been reimbursed all their advances for Marvine, etc. Other facts will be sufficiently understood from what is said in considering the questions raised on the appeal.

The action was referred to William M. Evarts, John Cochrane and Henry Hilton, Esqrs., by consent of the parties, and they reported in favor of the plaintiffs a balance amounting, with interest, to \$7626.09, for which judgment was entered. Various questions which arose in relation to the admissibility of evidence under, and irrespective of the pleadings, and in respect to objections

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made on the appeal which were not taken at the trial, are stated fully in the opinion of the Court.

It is from the judgment before mentioned that the present appeal is taken.

Wm. Curtis Noyes, for plaintiffs and respondents.

John W. Edmonds, for defendant and appellant.

BY THE COURT. WOODRUFF, J.—1. The first ground upon which the appellant herein insists that the judgment should be reversed is, that there is a defect of parties.

This objection is urged in two forms: first, that Edward E. Marvine is a necessary party to the action, if, in fact, the plaintiffs have any interest entitling them to prosecute; and second, that Marvine is the real and only party in interest, and therefore the plaintiffs are not entitled to prosecute or recover, whatever may be the merits of the controversy.

The provisions of the Code, in relation to the manner in which a defendant must avail himself of the objection that some other person should be made a party, are so explicit, that there is no room for discussion thereon. By section 148, it is expressly provided, that if that objection be not taken, either by answer or demurrer, the defendant shall be deemed to have waived the same; and therefore, if it had appeared on the trial that Marvine had an interest in the controversy, the defendant, by waiving the objection, is to be taken to assent to the prosecution by the plaintiffs without Marvine's presence as a party. (5 Duer, 168.)

It is, however, suggested, that under the provisions of section 122 of the Code, the Court, notwithstanding such waiver of the objection, has the power, and that, in this case, it was its duty to cause such party to be brought in. The clause of the section referred to is this:—"The Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the Court must cause them to be brought in."

It should be noticed here, that the inquiry is, whether the

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rights of the absent party will be prejudiced, and not whether the rights of the party before the Court, who has waived the objection, will be prejudiced. By not raising the objection, he has assented to the proceeding, so far as his own rights may be affected by it.

It is, then, we think quite obvious, that if Marvine, the assignor of the plaintiffs, has, by assignment with all needful powers, invested the plaintiffs with authority to prosecute this action on his behalf, as well as their own, then he will be bound by their acts done in pursuance of their powers—this suit will be his suit; his rights are protected by the parties whom he has selected and appointed to protect them, and in the very manner he has sought redress, and the judgment may, and ought to bind him. If he has given no such authority, and has not in any manner assented to, nor sanctioned their prosecution, then he cannot be prejudiced by a suit to which he is neither a party nor privy. In either aspect, his rights cannot be prejudiced.

But there is, we think, upon the case as it is presented, no ground for saying, that either the rights of Marvine or the rights of the defendant can sustain any prejudice. (*Grinnell v. Schmidt*, 2 Sandf. S. C. Rep. 706.) The plaintiffs hold an actual assignment, absolute in form, with full power and authority to collect and enforce the claim in controversy.

Under such an assignment, if the defendant had paid the amount due, to them, he would be fully protected, and if Marvine have any interest, under a secret trust, or under any understanding with the plaintiffs that the assignment is in truth only made to provide for the payment of advances made to or for him, it is only a right existing between him and them, to call them to account.

As already observed, the assignment to the plaintiffs is absolute in form, and, without attempting to recapitulate the evidence, we observe, that there was nothing developed on the trial showing, or in any manner indicating that the judgment will not be an effectual bar to any prosecution of the defendant by Marvine, or that Marvine has any rights which can be prejudiced by a complete determination of the controversy between the parties before the Court. And upon the proofs now before us, he would be held bound by what the plaintiffs do, in pursuance of his assignment, which, in terms, transfers the whole claim. Section 122 has, we think, no application to such a case; there was, therefore, no rea-

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son why the Court should, of its own motion, order Marvine to be brought in as a party.

And we may add, as to this branch of the subject, besides the waiver of the defendant by not taking the objection by answer, that it was not taken on the trial. It cannot be first raised on appeal.

The second branch of the objection is, that the suit is not brought in the name of the real party in interest. That Marvine is the real and only party. This averment is contained in the answer. It presents two inquiries; first, whether (assuming the claim to be assignable in its nature) the plaintiffs have any interest therein? and, second, whether it is so assignable?

Upon the question of fact, we perceive no ground for the suggestion, that they are not the immediate, and, according to the proofs in the cause, the only parties in interest. The present claim appears to have been asserted as early as the 27th of November, 1849. Marvine then made an absolute and unqualified transfer of the claim to the plaintiffs, and there is no evidence that such transfer was not as absolute, in fact, as its terms import. It is, however, claimed, that the complaint, in substance, avers that it was made as security for advances, and that the proofs show that the advances have been already repaid. We do not think the complaint must necessarily be regarded as containing such an admission: it is true, that it states the fact that the plaintiffs did make advances to Marvine, for the original adventure, in the fall of 1848, and that Marvine agreed at that time to pledge to them his interest in the adventure; and it is then averred, that in November, 1849, he sold, assigned, and transferred to the plaintiffs all the claims and demands he had or might or could have against the defendant, for the moneys and property obtained from him by the defendant, and for moneys received or due and owing, and for any false and fraudulent representation or deceit. But if this part of the complaint can be taken fairly to import that such transfer was only as a pledge in performance of the agreement made in 1848, still the plaintiffs are real parties in interest, unless it was shown, that the advances were repaid. This was not shown. We find no evidence proving such repayment, and the only evidence to which our attention was called, relied upon by the defendant, is the account showing the respective proportions

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of the parties in the net proceeds, of the adventure, received from California. But this account was between the three, and only showed such proportions, and how much the defendant had received, and how much the plaintiffs had received. It does not state how much Marvine owed the plaintiffs, nor that any of these moneys were paid over to Marvine, so as to raise any presumption that the advances had already been satisfied. Nor even that the state of the accounts, between Marvine and the plaintiffs, was such that the plaintiffs, by retaining Marvine's share of those proceeds, realized full payment. We need hardly add, that the plaintiffs having shown Marvine's assignment, the burden of proving his averment, that they were not the real and only parties in interest, was upon the defendant. He should make that proof reasonably satisfactory, without leaving it to rest upon conjecture; else the referees were bound to find the fact against him. We are clear that there is nothing to warrant us in regarding the finding which they did make, as against the evidence.

If, then, the present claim is, in its nature, assignable, the whole objection must be overruled.

We do not hesitate to say, that the claim is assignable.

It is an action to recover for an excess of money paid, and property sold and conveyed to the defendant himself, by the assignor of the plaintiffs, which was not legally due to him; and the allegations of misrepresentation and overcharge are made for the purpose of avoiding what would otherwise be the effect of the written contract, and of the settlement made between the parties, upon the basis of that contract. But for the writing, which Marvine (the assignor of the plaintiffs) was induced to sign, and the subsequent settlement of the account, and so long as the transaction rested upon the actual bargain between them, the right of the assignor to proceed as for so much money due to him, from the defendant, upon contract, would not have been open to discussion or doubt. That bargain provided, first, for a sale, to Marvine, of one-half of the barque John W. Cater, "at the cost price thereof, which the defendant had paid therefor;" and, had that price not been fixed by the written paper, it is obvious, that in any subsequent settlement of the transaction, such actual cost, and that only, would have been the subject of charge to the plaintiffs' assignor (Marvine).

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It is found by the referees, that, by the defendant's misrepresentations respecting the actual cost of the barque, Marvine was induced to allow and pay a much larger sum than such actual cost, and to settle the account of the joint adventure, subsequently stated, between them. It is true, that payment was made, in part, by the conveyance of property; but that does not alter the right of the party in this case. The sum to be paid was agreed upon, and such property was taken in payment of that amount, and for the purposes of the agreement, as cash. The purchase, and the other provisions of the bargain between the parties, contemplated a joint adventure, at the equal expense, and for the equal profit of the parties, in which the defendant should sell to Marvine one half of the vessel, at the price or rate which he paid for her, and to which the parties should further contribute certain equal amounts for outfit and cargo.

Had the written paper not been signed, and the state of the accounts had been open to adjustment, the whole resting in the actual parol agreement, the case would have been one of mutual dealing between the parties, lying wholly in contract, in which moneys had been paid and property transferred which was the proper subject of an accounting between them. And, after a settlement, if it appeared that, either by mistake or through misrepresentation, the one or the other had received a greater sum than was justly due or payable to him, the excess would have been clearly recoverable; it would have been so much money due to the other in respect of the contract between the parties; due because of the contract, and in virtue of the rights which resulted from the contract; allegation and proof of the misrepresentation therefore became material in the present case not as the foundation or ground of the claim of Marvine to the moneys sought to be recovered, but as a means of avoiding the effect of the writing and the settlement which the parties made, so far, and so far only as they would, but for the alleged misrepresentation, have precluded inquiry into the actual state of the dealings between the parties.

In this aspect of the case, (and the finding of the referees in their statement of facts is in accordance with this view,) the claim assigned is a money demand founded on the actual contract between the original parties to the transaction, and as truly assignable as the interest of a partner in the accounts of a firm. If the

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settlement of those accounts does not conclude the partner himself, by reason of any mistake, fraud or misrepresentation by means of which it was effected, it in nowise renders the claim to recover for moneys paid, or moneys unjustly retained, or property sold and delivered, under the influence of such mistake or misrepresentation, less assignable than any other demand. (5 Duer, 254.)

The only part of the claim in this action which it seems to us can be plausibly asserted to lie in tort is that which relates to the over-charge for the vessel. We are not able to perceive that he who agrees to sell property at its cost, and then, by way of fixing the amount which is payable, states that cost untruly, and thereby obtains more money or more property, (conveyed and accepted in lieu of money) than is due to him, is not liable as for so much money had and received to the use of the deceived party. This involves no rescission of the contract; it is the enforcement of the actual agreement of the parties, and requires only the restitution of the excess unlawfully obtained.

The case of *McKee v. Judd*, (2 Kern. 622) does not, we think, warrant the defendant's claim that such a cause of action is not assignable, but rather the contrary. It is there held, by the Court of Appeals, that an action for the unlawful detention and conversion of goods is assignable.

In *Zabriskie v. Smith* (3 Kern. 322) it has since been held, by the Court of Appeals, that a right of action for damages, caused by a false and fraudulent representation of the solvency of the vendee of merchandise, (a third person,) upon faith whereof the assignor of the plaintiff sold and delivered goods to such third person, is not assignable. This and the cases cited to us fall far short of holding that if one himself obtain for his own use, either the money or property of another, by misrepresentation or fraud, the claim to recover the same, or the value thereof, is not assignable. Still less do they apply to the present case as found by the referees herein.

If, as is intimated by Mr. Justice Denio in the case last referred to, in approval of the observation of Lord Abinger (in *Raymond v. Fitch*, 2 Cr. Mees. & Ros., 588,) "the power to assign and to transmit to personal representatives are convertible propositions," although such power to transmit to representatives be derived

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from a statute, there would seem no room to doubt the assignability of the whole cause of action. We think this is clear, independent of any statute; but if otherwise, the provisions of our statute, (2 Rev. Stat. 447, § 1,) appear to cover the claim. By this it is provided that for wrongs done to the property, rights or interests of another for which an action might be maintained, etc., such action may be brought after the death of the person injured by his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contracts. The exceptions to this broad enactment are specified in the second section, and they are actions for injuries to the person and no others.

We, however, do not rest upon this view of the subject, and are not prepared to say, whenever it is provided by statute, that an action which could not heretofore be maintained by an executor or administrator shall survive to him, that such cause of action becomes thereby assignable.

II. The next point urged upon our attention is, that the referees erred in receiving the deposition of B. H. Folger in evidence.

When the deposition was offered in evidence, the defendant's counsel "objected to its admissibility," and the case states that the question was reserved by the referees. This was on the 18th of March, 1853. No ruling was had upon this offer, and the trial was adjourned. On the 5th of May, the trial was continued, and again adjourned. On the 10th of May, 1853, the plaintiff's counsel again offered the deposition in evidence. The defendant's counsel then objected "to its admissibility, on the grounds that the evidence of the witness's inability to attend is insufficient; that the witness had been here since the trial commenced, and that the certificate is not according to the statute."

The trial commenced on the 18th December, 1851. On the 18th of March, 1853, the son of the deponent testified that the deponent lived in Buffalo, that he was in this city in April, 1852, to be a witness in this case; that he was then in feeble health, and was detained by sickness at Utica, on his journey home. And that he was here again in September, 1852, in the hope it would be of service to his health. That he returned home much weaker, and since, has been unable to make a journey. That his complaint is consumption. That when the son left Buffalo, about a

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week prior to his testifying, the deponent was very feeble—unable to get out of the house, not able to sit up all day; “we scarcely expect him to live from week to week.” And he gave other testimony in relation to the period, during which he had been in a condition too feeble to admit of a journey.

It seems to us, that this testimony was quite sufficient to show that the deponent was unable to attend on the trial, when the testimony was given. And that in the absence of any evidence of a change in the condition of the deponent, it carried with it the almost necessary conclusion, from the nature, extent, and duration of his illness, that he was unable to attend on the 10th of May, when the deposition was finally offered and received.

Indeed, this branch of the objection was not insisted upon, on the argument of the appeal. Nor was it urged that the fact, that in an earlier stage of the trial, the witness had been in this city, made any difference. It is quite obvious, that when a trial is protracted, as was the trial of this action, for more than four years, (from Dec. 18, 1851, to Feb. 13, 1856) by causes which we may assume to have been either sufficient in themselves, or so regarded by the parties, all the witnesses, on either side, could not be examined in any one day, or in any particular week. Nor can we say that a party was bound to alter his order of proof, or call first those witnesses who were sick, or who might be unable to attend at a future day. And it is not less obvious, that during so protracted a trial, witnesses would probably change their residence, some become ill, and some probably die. The parties undoubtedly were exposed to some hazard of losing their testimony altogether, but if, notwithstanding the delay, the testimony could, in a subsequent stage of the trial, be procured in a legal form, we do not think it should be wholly excluded, because the party, had he known which of his witnesses could, and which could not, continue their attendance to the end of the trial, might have examined the latter at the earliest opportunity.

The other objection is, to the sufficiency of the certificate. The supposed defect does not appear to have been pointed out on the trial; but, on the appeal, it is suggested that the officer before whom it was taken, although he has certified that it was read to the witness, does not certify that it was “carefully” read to him. (2 Rev. Stat. 399, § 47 [37]).

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We are of opinion, that in what relates to the mere mode of taking the deposition, and the conduct of the officer therein, it is to be presumed, when he certifies to the fact of taking, that his duty was performed in obedience to the statute. The same section of the statute which directs that the deposition be carefully read to the witness, also requires that the officer insert therein every answer or declaration of the witness, etc. It has not, so far as we have known, been the practice to certify that this was done. Nor do we deem it necessary so to certify. The omission to insert such answers would be ground for a motion to suppress the deposition. It will be presumed that the officer did insert such answers, etc., until the contrary appears. So, we apprehend, it may be presumed that the deposition, when read to the witness, was carefully read. This is presuming very little in favor of a sworn public officer. And so much, at least, we think should be presumed, if, indeed, it is necessary for the officer to certify any thing more than that the deposition was taken before him.

How far it is to be deemed the duty of the party to be affected by a deposition of this description, to move to suppress the deposition, if he desires to avail himself of objections which could be obviated, either by a correction of the alleged defects, or by a re-examination of the witness, we do not think it necessary to decide. (19 Wend. 437; 5 Duer, 100.) The general rule, in relation to such defects in depositions taken *de bene esse*, has, in this court, been repeatedly stated to require, that the objection be taken by motion to suppress the deposition.

We might dispose of this point by adding, that these were the only grounds of objection to the deposition, stated on the trial. (5 Sandf. 191; 1 E. D. Smith, 70; Id. 549.) No other questions were raised before the referees, or passed upon. But on the argument of the appeal, three other objections were taken to the deposition, and here taken for the first time.

Without conceding that objections not specifically stated below, can be raised here, we observe, the objections that the deposition was taken under an order of a Judge of the Supreme Court, and before a County Judge in Erie County, are, we think, groundless.

These objections were urged, under an assumption that the deposition was taken pursuant to article 1st of title 3, chap. 7, part 3d of the Rev. Statutes (2 R. S. 391). "Of taking condi-

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tionally, the testimony of witnesses in this State," which authorizes the taking by, and under an order of a Judge of the court in which the suit is pending.

The deposition was, in truth, taken under the fifth article of the title above mentioned (2 R. S. 398). "Of proceedings to perpetuate testimony." This title authorizes any person, who is a party to a suit pending in any court of this State, or who expects to be a party, etc., to apply (among other officers) to any Justice of the Supreme Court, or to the First Judge of the county courts of any county, for an order for the taking of the deposition of any witness who is material, etc. And such officer shall appoint a place, within the county, where such witness resides, and a time, etc., for the examination of such witness. And by § 51 [41] he may order such examination to be had before any other officer, to whom such application might have been originally made, residing in the same county with the witness.

These provisions plainly authorized Mr. Justice Edwards of the Supreme Court to make the order for examination. And they authorized him to direct, that such examination be had before the County Judge of Erie County, in which county the witness resided, if the application might have been originally made to such County Judge.

Section 29 of the Act in relation to the Judiciary, passed May 12, 1847, (L. of 1847, ch. 280, p. 319,) provides, in relation to County Judges, elected under our present Constitution, that, in their respective counties, they shall have power to perform all the duties and do all the acts now required to be done and performed by the Judges of the county courts, (when not holding county courts,) or any one or more of them, at Chambers, or otherwise, so far as those acts and duties are consistent with the Constitution and the provisions of this Act; and by § 36, all laws relating to the present Courts of Common Pleas, and the officers thereof, and their powers and duties, shall be applicable to the county courts of the respective counties, and the officers thereof, and their powers and duties, etc.

The First Judge of the County Court was a Judge of the Court of Common Pleas for the county, prior to the new Constitution. (2 Rev. Stat. 208, § 2.)

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By the statute above recited, the County Judge succeeded to the powers of the First Judge of the County Courts.

Such First Judge had power to make the order for the examination of a witness, under the statute in question; and a Judge of the Supreme Court might direct the examination of a witness to be had before the First Judge of the county in which the witness resided.

It follows, that the order of Mr. Justice Edwards, directing the examination of the witness to be had before the County Judge of Erie County, was a proper order.

There was no necessity for entitling the affidavits, upon which the order was made in the Supreme Court, nor do we think it was proper to do so. But it will be perceived, that the affidavit of the plaintiff states correctly the suit which was pending, in which the testimony was material, and describes it as a suit in this Court. This was all that was necessary. The attorney may have supposed, that, because the order was to be granted by a Judge of the Supreme Court, it was proper to entitle the affidavits and order, of the Court, in which such officer was Judge. This was, we think, mere surplusage. The Court and the cause, in which, in fact, the testimony was to be used, were correctly described, and no other entitling was required. So, as to the deposition; its caption describes it as taken in pursuance of the order annexed. And that was, in like manner, all that was necessary, and all that was of any manner of importance.

It is hardly necessary to say, of the objection that much of the testimony of Folger was hearsay—that it was not objected to on the trial. We cannot say, that the defendant's counsel did not prefer to have these portions of the deposition read; at all events, by not making the objection there, he waived it. It cannot be, for the first time, raised on the appeal.

III. As to the admission of Roland Gelston's deposition, it must suffice to say, that it was not objected to; and if there was any well-founded objection, that, also, was waived. (2 E. D. Smith, 850.)

IV. As to A. K. Marvine's deposition, it appears, that it was taken, by consent, before one of the referees. When it was offered, no specific objection was pointed out. The defendant's counsel objected, generally, to its admissibility. No illegality, in

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the form or manner of taking the deposition, was suggested. No claim was made, that the absence of the witness was not sufficiently proved.

It is now objected, that the deposition was not properly certified; and second, that there was not sufficient proof of the absence of the witness or of his inability to attend.

A brief notice of the circumstances, under which the deposition was offered and received, will show, we think, that the case is one, which conclusively illustrates the rule, that a party should state his objection specifically, so that the adverse party may have the opportunity to obviate the objection, or cure the defect; otherwise, such objection shall not be permitted, to avail on appeal. Good faith between parties and counsel requires, that such objections should be specifically pointed out.

At the hearing of the cause, on the 16th of March, the plaintiff examined a witness, to prove, preliminarily, the absence of the deponent, A. K. Marvine.

He proved, that the deponent was the travelling agent of the assignees of H. T. Lathrop & Co.; that he was absent from the State, in Columbus, Georgia, or Montgomery, Alabama; that the last letter received from him, by the witness, was from Columbus, dated 5th March; that the witness was the book-keeper of the said assignees; that he did not know when Marvine would be back; that he was expected back at some time; that he (the witness) should think Mr. Marvine ought to be back in a month or six weeks, but that he had said nothing in his letter about returning.

Upon this testimony, the plaintiffs offered the deposition in evidence, and the defendant objected. Upon what ground, it does not appear. We think the absence of the witness fully proved. Nor is it even now urged, that, had the deposition been read, at that time, this point would have been doubtful.

But the referees adjourned pending the question, before any argument thereupon. The question does not appear to have been further agitated, until the meeting of the referees, on the 23d of May, when the offer of the deposition was renewed, and the objection was overruled, and the deposition was read.

No ground of objection was then stated. Had it been intimated, that the proof of continued absence ought to be brought

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down to that time, there would have been an opportunity for the plaintiff to recall his witness, and show, that Marvine had not yet returned. But no intimation was given, that any change had occurred in the circumstances, which could or ought to affect the decision of the referees upon the question, which had been so long pending; nor that it was the duty of the plaintiffs to prove, that no change had occurred. Indeed, the parties and the referees, all appear to have treated the matter, as standing upon the same footing as when the question first arose.

In *Fry v. Bennett*, (4 Duer, 252,) to which we are referred, the specific objection, that the absence of the witness was not sufficiently proved, was taken, and ruled upon distinctly; and that case does not, therefore, meet the present point, nor sustain it.

To permit the defendant, now, for the first time, to raise the objection, that the deponent might have returned between the time when his deposition was first offered, and the time when it was received, would be unfair to the plaintiffs—would encourage a practice tending to entrap the adverse party, and to mislead the referees into error; and the objection cannot be permitted to prevail. (5 Sandf. 191.)

The other objection, to wit, that the deposition is not properly certified, must be disposed of upon similar grounds. It was not stated at the trial. If it had been, it could, and undoubtedly would have been immediately cured, by a proper certificate.

The deposition itself was taken, during the trial of the cause, informally, by consent, before one of the referees, instead of the three; and, having been so taken, it was offered to be read in the hearing of the three referees, at a subsequent meeting. It was taken in the presence of the counsel, for both of the parties, by question and answer, on full examination and cross-examination, occupying three days. They, as well as the referee taking it, were, therefore, fully cognizant of the facts, and had it been suggested that a formal certificate was wanting, such referee could instantly have given it. To allow such an objection to be now, for the first time, successfully urged, would be, we think, doing violence to the intention of the parties—sustaining an objection never in fact made, nor intended to be made, at the trial—one upon which the referees have never passed—and one which, if sustained, would encourage a practice of keeping back objections

which might readily be obviated at the trial, and so enable a party to speculate upon the result of such trial, with a design (if such result be adverse,) to spring upon his adversary an objection, not meritorious in itself, and involve him in all the vexation and expense of further litigation.

As to the suggestion, that some portions of Marvine's testimony was hearsay, it is sufficient to say, as we have said, in regard to Folger's testimony, that, as defendant did not object to the reading of these portions of the deposition, we may properly assume, that he preferred to have them read; indeed some of those portions to which our attention is now called, are in the cross examination of the witness by the defendant's counsel. At all events, this objection, not being raised at the trial, was waived. (See, also, in reference to this deposition, 19 Wend, 437; 5 Duer, 100.)

V. In regard to the re-examination of witnesses after they have left the stand, it is hardly necessary to say, that it was purely discretionary with the referees; and, the exercise of that discretion can only be reviewed here, if at all, when it plainly appears that it was abused, to the defendant's prejudice. (6 Wend. 281; 19 Ib. 578; 1 E. D. Smith, 78; Ib. 543.) If, when recalled, the evidence proposed was irrelevant or incompetent, it should have been objected to.

VI. Parol evidence was given of the contents of what purported to be a letter. It had been shown, that the defendant had had in his possession such a paper, and had exhibited it to the witness: notice had been given to the defendant's attorneys to produce it on the trial. We perceive no ground for saying that parol evidence was not thereby made competent.

VII. It is also urged upon us, that the referees improperly received evidence of the cost of a house in Murray street, which the plaintiff's assignor sold to the defendant, and which the defendant had accepted in part payment for the vessel which was the subject of dispute.

The admissibility of this evidence, we think, appears, from a review of the manner in which the question arose. The defendant, by his answer, charged, that E. E. Marvine (the plaintiffs' assignor,) had, in relation to this house, practised a fraud upon the defendant, to induce him to accept the lease in payment, by representing that it was worth ten thousand dollars; . . . that it was

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very valuable, etc. That such representations were false, and made with intent to deceive and defraud the defendant. On the trial, the defendant examined numerous witnesses, to prove the value of the house and lease, (the latter having over twenty-three years to run, without ground rent,) in 1848, when the contract between the parties was made. The estimate of the witnesses varied, from \$3500 to \$10,000. Several valued the property at \$4000—several at \$5000, and some higher. On the cross-examination, it appeared that some of the witnesses, in their estimate, paid little, if any, regard to the house; others knew nothing of the amount of rent derivable therefrom; one, at least, regarded the house as an old house.

The defendant does not appear, by his answer, to have pointed his charges of fraud, in this respect, to any particular relief, or to have made any counter-claim, founded upon a fraudulent over-valuation. But the referees thought proper to permit the defendant to go into this proof; and he opened the subject, by the testimony of witnesses, as above stated.

It was, therefore, clearly open to explanation and rebuttal. With this view, the plaintiff examined several witnesses, who estimated the value of the property at \$10,000 and \$11,000—including, of course, the whole unexpired term of the lease.

In this conflict of evidence, and when some one of the defendant's witnesses had estimated the whole as low as \$3500, it was, we think, by no means incompetent nor irrelevant, to call the mechanics who built the house, and show that the house was built only three years before the sale—that the carpenter's and mason's work cost over three thousand dollars, and the whole building cost thirty-five hundred dollars. Upon a question of fraud, and where the estimates of value ranged so widely, surely this evidence might properly be taken, to fortify the testimony of the witnesses for the plaintiff, and show that the witnesses who had set so low an estimate upon the value of the house and term of the lease, were unreliable; and, still more clearly, to repel the charge of fraudulent over-valuation.*

VIII. So in relation to the value of the vessel, the one-half of which was sold to the plaintiffs' assignor. The defendant had alleged, and endeavored to prove her value in the market to be as

* *Gray v. Lessington*, ante p. 257.

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great, and even much greater than the sum at which the sale was made. It was competent for the plaintiff (if the question of value was open) to rebut this proof. He sought to do so by inquiring her value of a competent witness. His answer was:—"Her value in the market in 1848 was, that if she had been put up at auction, she might have brought three thousand dollars."

The answer was objected to.

It is undoubtedly true, that an auction sale is not the only mode of testing the market value of property, but it is a very common mode of sale, and we cannot close our eyes to the fact, that immense amounts of property, real and personal, are disposed of daily in that very mode. Indeed, there is some reason in saying, that in an open market, with free competition, on a voluntary sale, that mode would furnish the most satisfactory test of market value. We are clear, that it is some evidence, and in its nature is competent and proper to be weighed by a jury or referees. The defendant's counsel themselves, acted upon this view of the subject. The very witnesses whom they examined to show the value of the house and lease before referred to, were four real-estate auctioneers. As to property commonly sold at auction, and having reference to sales made by voluntary consent of the owner, and with a view to produce the highest price, in the absence of circumstances tending to prevent that result, such a sale would be very strong evidence of true market value.

The answer of the witness cannot be understood to have reference to forced sales, or sales made against the will of the owner, under circumstances which require or show an actual and peremptory sale, without regard to the probable result upon the owner's interest. Proof of the result of such a sale may be very properly rejected when offered to contradict (as it sometimes is, in actions of trespass or trover) the testimony of witnesses to the fair market value.

IX. We find, in relation to the alleged inadmissibility of an entry which was offered in evidence from the books of the Astor House, that it appears to have been offered for the purpose of showing that the plaintiffs' assignor, Edw. E. Marvine, arrived in this city on the 25th of October, 1848. It was shown, that the entry was in the handwriting of Mr. Coleman, who kept the books, and that Coleman was, at the time of the trial, in the State of Tennessee, having been absent eight months. The entry being

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offered, was objected to, and the counsel for the respective parties then made the following stipulation :—" It is agreed, by counsel, that the entry shall be considered proven, as stated, and if admissible, shall be received when passed upon by the referees, and that the counsel for the defendant have his proper exceptions to the entry."

We do not deem it necessary to inquire, whether the evidence was competent or not. The plaintiffs do not appear to have afterwards called for any ruling on the subject. It does not appear whether the referees deemed the evidence admissible or not; nor whether they received it as evidence. We have, therefore, no ruling, and no exception to review.

The practice of inserting evidence in a case, as taken subject to objection to be afterwards considered and ruled upon, necessarily devolves upon him, who would insist upon the matter as evidence in the cause, the duty of obtaining a ruling upon the subject in some stage of the trial, and there is no ground for exception, nor, indeed, any cause of complaint by the other party until such ruling has been had. (5 Duer, 219.)

If the referees had rejected the evidence, the plaintiff, in the present case, would have had his opportunity to except. If they received it, the defendant would have had the same opportunity. But it is no ground for reversing the judgment that they did not decide the question at all, because the parties stipulated that it be considered proved thus provisionally, and never afterwards sought any ruling. It does not appear, that it was, in fact, received at all. Whether the referees would have received the evidence, or rejected it, we cannot say. If we are to presume any thing in relation to it, we should presume that they would have decided according to law. And in the absence of any ruling declaring it admissible, it must be treated, as not in fact in evidence. Indeed, we see no propriety in inserting the matter in the case.

X. What has already been said in relation to a supposed defect of parties, and on the subject of the assignability of the cause of action, seems to us, to dispose of the motion made on the trial to dismiss the complaint.

Indeed, the sole ground then stated, was, that the cause of action was not assignable. We have stated our views upon that point; indeed, as to any portion of the claim, except what related

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to the over-charge for the vessel, we do not perceive that it has any plausible foundation.

On the argument of the appeal, the omission to make Edw. E. Marvine the plaintiffs' assignor, a party, is insisted upon, and it is insisted, that he was not only a necessary party, but that he was, in fact, the only party in interest.

We have already said, that defect of parties must be taken advantage of by demurrer or answer, and when the objection is not taken in that mode, and much more, when, besides that omission, it is not even suggested on the trial, it is to be deemed waived. And in regard to the objection which was taken by answer, that Marvine was the only real party in interest, we have said all that we deem necessary. The plaintiffs were parties in interest, and *prima facie* sole parties in interest, the burden of proving the allegation of the answer was cast on the defendant.

XI. It is also now, for the first time, insisted that certain material facts were not proved, and that the complaint ought to have been dismissed upon that ground. As to this, it would suffice to say, that where no such ground of dismissal is stated at the trial, the whole evidence in the case is to be taken into view. The omission to take the objection when the plaintiff rests, is a virtual submission of the case to the referees upon the whole evidence, and the only inquiry, thereafter, is, Have the referees, in their report, found the facts either without evidence, or so clearly against the weight of the evidence, that their report, (it being for this purpose regarded as a verdict of a jury,) should be set aside on that ground?

XII. This brings us to say, (without attempting, under color of giving reasons for our conclusion, to detail the evidence and subject it in its various aspects, and in its bearing upon the rights and conduct of the parties, to extended comment,) that we cannot find reason to declare the findings of the referees unsupported by the testimony and proofs given on the trial.

We have given to the whole evidence a full, and, we think, a careful and thorough scrutiny. We have been greatly aided in this by the full analysis, and by the astute and critical examination of details, furnished us by the defendant's counsel, and the able argument presented at the hearing, with the points then submitted.

We need hardly say, that we are not at liberty to treat this

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branch of the case, as if the issues were now open to us for trial and determination, according to conclusions which our own minds might form, in the first instance, were we sitting ourselves either as jurors or referees. Quite otherwise. The question for us is; was there any evidence to sustain the finding of facts? or, is such evidence so overcome, as to create a preponderance so clearly and decidedly in favor of the defendant, as to warrant us in disregarding the conclusions at which the referees have arrived; whose especial province it was to determine the facts; who had the witnesses before them, and who may be regarded as having been appointed, because it was peculiarly fit and proper, that the matters of fact in dispute should be left to their determination? (5 Duer, 216.)

To the question thus stated, we are constrained to answer in the negative. And this answer disposes of most of the further details, which are pressed upon our attention, and which are, in truth, only particulars, under the more general claim to relief, on the ground last stated.

In thus stating the question, which is properly before us, and our conclusion thereon, we are not to be understood as intimating, that, had the broad question, presented by the pleadings, been before us, our conclusions of fact would have been less favorable to the plaintiff, than those of the referees. But we state the true question before us, and our whole duty is discharged, by a correct decision of that question.

XIII. It is, however, proper to notice the point insisted upon, that the referees have not in terms found that the misrepresentations and over-charges, which they do find to have been made, were fraudulent.

We think, on this subject, that, although they have not made use of the word fraud, or fraudulent, the facts which they do find, in their necessary legal effect, for all the purposes of the relief sought, constitute fraud. We think, also, that the facts found entitle the plaintiff to the relief granted, even if they can be reconciled with the absence of a fraudulent intent, in the mind of the defendant.

And, moreover, that, (sitting, as we are, in a court of equity, as well as of law,) if it be assumed, that the various misstatements and over-charges found by the referees were mistakes only, the

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plaintiff would be entitled to the same relief, which the referees have awarded.

Some other points remain, however, to be considered.

XIV. It is objected, that the referees have allowed, in the account of over-charges, one which was not particularly specified in the complaint, to wit: On the bill of goods, purchased by the defendant from John Thursby, for the cargo of the vessel sent to California, on joint account of the defendant and Marvine, and for which he paid (as appears by the testimony of John B. Thursby) \$888.17, but which was charged in the accounts at \$1000.67.

The objection is not, that this over-charge was not proved; but that, it not having been specifically mentioned in the complaint, it ought not to be allowed.

Obviously, if this objection were well founded, it could only render it necessary, that the plaintiff should submit to a correction of the judgment in this respect, if he so elected, without going to a new trial. But we are of opinion, that the objection is not well founded.

1. The complaint does not purport to specify all of the false charges, either for outfit or cargo.

It charges the fact, that false charges were made, and specifies several, which have been discovered since the accounts were rendered to the plaintiff's assignor, which, the complaint states, are among the false representations, etc., made by the defendant.

2. The evidence, in relation to the over-charge referred to, was received without objection; and the over-charge was fully proved. Falling, as it did, within the actual charges made in the pleadings, it having been made the subject of examination and proof, without objection, and having been established, it was so far from erroneous to allow it, that we think it would have been erroneous, as well as unjust, to reject it.

3. The allowance of this item does not increase the recovery beyond the amount claimed; on the contrary, the report is for a less sum than the amount prayed in the complaint.

XV. In regard to the alleged settlement between the parties, we think, that the testimony on this subject, if credited by the referees, might properly have been regarded as strong evidence, in favor of the defendant, of the true amount, at that time, due to Marvine, in rectification of the account of the outfit and cargo;

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though this was subject to large abatement, from the weight of the testimony, since the defendant (by his sworn answer), and his sole witness (his former clerk) differ materially as to that amount. And the defendant ought not to complain, if, in reference to the sum claimed to have been tendered, he is held to the truth of his own answer.

But it is only as such evidence, that we think the referees had a right to regard the testimony on the subject.

It was not conclusive; the discovery and proof of other errors and over-charges, not embraced within such modified account, would overcome it.

As a bar to further inquiry, it was ineffectual. The matter, viewed as an accord, was *in fieri*; it did not amount to a binding contract. Some of its provisions remained to be settled, and even reduced to writing. Giving full weight to all the testimony of Dudley, it amounted to nothing more than an admission by Marvine. As an accord, it was incomplete; and, before it was acted upon, Marvine declined a settlement.

The referees have found, that no sufficient tender was proven to have been made, at any time, respecting the subject matter of this action.

Whether the referees discredited the witness who testifies in relation to the offer of the money to Marvine, either because the sworn answer of the defendant does not correspond with the evidence, or because they had not confidence in the truth of the witness; or whether they regarded the tender as insufficient, because it is set up as a compromise, merely, which the plaintiffs' assignor was at liberty to reject, until the whole arrangement should be fully agreed upon, so that there was, in fact, no final accord, of the performance of which any tender could be alleged; or whether they simply intended, that no tender could be deemed sufficient, in bar of the action, that was not followed, in pleading, by an averment of readiness, etc., and a bringing of the money into Court, does not clearly appear. In either aspect, we think they ruled correctly.

XVI. It is further insisted on the part of the defendant that the referees erred in not allowing certain items to the defendant in respect to which some evidence was taken under objections by the plaintiffs' counsel, and which evidence was held inadmissible

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and rejected because no set-off or counter-claim was contained in the defendant's answer, and the pleadings contained no issue in respect thereto.

These items consist of an amount alleged to have been paid by the defendant in January, 1849, for a gold tester; certain two notes alleged to have been paid by the defendant for Marvine; moneys paid by the defendant to one Carmack, claimed to have been paid for his services or expenses in relation to the joint adventure after January, 1849; an alleged erroneous charge to the defendant for compensation of one of the supercargoes, contained in the account of H. Sheldon & Co., of the returns of the adventure on the final distribution of the net proceeds in January, 1850; and a charge to the defendant in the same account for insurance on the return of the proceeds of the adventure.

If we were at liberty to test the ruling of the referees by inquiring whether these items should have been allowed to the defendant upon the proofs in the cause, irrespective of the state of the pleadings, we think there is no doubt that these items should be rejected with the possible exception of \$5.50 for the cost of the gold tester, in respect to which there may be some doubt, whether it was not purchased in the exercise of a reasonable discretion, though without any express authority or sanction from Marvine, and yet the proof does not appear to show that it was used for the joint benefit, nor what ultimate disposition was made of it.

But the referees have not passed upon the merits of the defendant's claims in these particulars, and we are therefore to consider the question as though the evidence in relation thereto might, if not rejected, have influenced their determination upon the facts so as to have affected the balance found due from the defendant. The ruling of the referees in truth was a rejection of the evidence on the ground that the plaintiffs' claim to these allowances was not warranted by the pleadings.

The answer does not in terms claim or demand any allowance as a set-off or counter-claim. Nevertheless, if it states any facts which would, if proved, entitle him thereto, the omission of a formal claim to set off the same, or abate from the claim of the plaintiff, ought not to preclude him.

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The only parts of the answer which it is contended by the defendant's counsel may embrace these items, are two:—

In one part of the answer which relates exclusively to the allegations of the complaint, that the accounts rendered by the defendant of his purchases for the cargo of the vessel were false and untrue, the defendant says, "in reference to the purchases for the said cargo and the accounts rendered thereof," that, an invoice was made and delivered to Marvine by a clerk of the defendant without his knowledge; that no bills were shown, etc.; he then explains the invoice, and says it was not an account as between him and Marvine nor ever pretended so to be, and that Marvine took the invoice and made up the account, from the same himself without any consultation with the defendant, and the answer then adds, "that the account so made up by Marvine omits many credits to which this defendant is legally entitled, and the errors in the same are in Marvine's favor. That it omits charges which ought to have been included therein in favor of the defendant to the amount of thirteen hundred dollars."

It might very properly be urged that although this is not put forward in the form of a counter-claim, still if the referees opened the accounts for correction they should allow to the defendant for any items which it was shown were omitted, and this, notwithstanding this allegation is so general that it in nowise apprised the plaintiffs what charges were so omitted. And this the defendant's counsel does in fact claim, with the further suggestion that if the plaintiffs desired a particular specification they should have sought it by amendment or by bill of particulars.

But it will be seen that these allegations relate exclusively to the account of the purchases by the defendant for the *cargo* of the vessel. They are in terms limited to that account.

No account of those purchases made up by Marvine was produced or proved, to which the allegations could be referred. The account of those purchases which was produced and which was admitted to be in the handwriting of the defendant, was rendered and settled on the 3d of January, 1849. Neither of the counter-claims (so called) which the referees rejected had any connection with the purchases for the cargo of the vessel, and the sum paid for the tester, and the amount advanced to Capt. Carmack were not paid until after that account was rendered and

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settled. The items sought to be proved could not have entered into that account. They do not either of them come within the description of errors or omissions in that account. The allegation of such errors, therefore, laid no foundation for proving such items. These items had no existence when the account to which the allegations refer was made up and settled. I need hardly add that an allegation, that the account contained errors and omissions, will not entitle the party to prove matters which not only were in nowise a proper subject of charge in such account, but which when such account was made up and settled, had no existence.

The other clause in the answer, which is supposed to warrant the giving of the evidence, is the following: The answer alleges that, after some of the errors in the accounts had been corrected, and after the plaintiffs' assignor (Marvine) had thoroughly examined the defendant's accounts, a statement of accounts and of disbursements was prepared by the defendant and Marvine. This statement is what is relied upon as a final settlement of the cost of cargo, and of the outfit of the vessel, upon which the tender of the balance is alleged to have been made. It is produced on the examination of the witness Dudley, and it appears to have been adjusted, so far as any adjustment took place, on the 17th of November, 1849.

After averring the making of such statement, and the defendant's offer to pay the balance, appearing thereby to be due to Marvine, the defendant's answer further continues, that he then stated to Marvine, "That this offer was made for the purpose of an amicable settlement, although it did not secure to this defendant his legal commissions, nor the rent of the house in Murray street, which the said Marvine had wrongfully collected, as aforesaid, nor other amounts justly due defendant." Here is, obviously, no allegation, that there were any other amounts due, but only that he then *stated to Marvine*, that he made the offer, . . . although it did not secure to him . . . other amounts due, etc.

The answer then proceeds: "And this defendant saith, that he has since discovered a large amount of indebtedness from the said Marvine, to him, of which he was ignorant at the time of such conversation; and defendant saith, that the said Marvine

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refused the money so tendered, and left the counting room of the defendant."

Here is no fact alleged, showing any indebtedness. It presents no charge which could be the subject of an issue. It makes no claim to set off, or counter-claim any thing. It does not even allege a legal conclusion, that the plaintiffs' assignor is indebted, but only, that the defendant afterwards discovered an indebtedness.

The insufficiency of such an averment to warrant any evidence under it, may be illustrated, by supposing a plaintiff to exhibit a complaint in those terms. Could it be plausibly insisted, that it contained a cause of action? We think it most clearly would not; and, if not, then no evidence could be received under such an averment, if it were objected to. It is proper to add, on this subject, that the counsel for the defendant was in error, in supposing that the evidence concerning the items of supposed counter-claim, now under consideration, were not objected to. The report of the referees states, that the evidence was objected to, and the objection reserved for consideration, and the evidence finally rejected.

XVII. In relation to the rent, which the answer did, in terms, aver had been collected by Marvine, the referees did not reject the evidence. Whether the averment was proved, and to what amount, were questions properly left to their decision, and for reasons already given, we could not interfere with their conclusion, unless very clearly against evidence. But in this particular, we see no possible reason for questioning the justness of their rejection of the claim, for it appears by the account made up between the parties, January 8, 1849, that this matter was adjusted between the then parties, and that this very rent was then allowed to the defendant.

Marvine had collected the rents of the Murray street property, to the 1st of November, 1848. The title had not then been conveyed to the defendant, but the original agreement by which it was to be conveyed, was dated October 2d. It was, therefore, a proper subject of negotiation, from what time the rents should begin to accrue to the defendant. It was, doubtless, just that he should have the income of the property from the time he was entitled to the assignment of the lease. The matter was settled

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by allowing him one month's rent out of what Marvine had collected.

XVIII. The only remaining question is, whether there is, in the case itself, evidence of bias and partiality in the referees, which warrants us in setting their report aside.

If their rulings were correct in law, and their findings of fact were supported by such evidence that we cannot say they should be set aside, as without evidence, or as against evidence, then the argument of the defendant's counsel fails, for there is no extrinsic proof offered to show actual bias or partiality. Nay, more, it is not intimated that any extrinsic fact exists which would warrant even a suspicion of such bias or partiality.

It follows, that what has already been said, must dispose of this question. The alleged errors in law have been considered, and we have already said that we cannot find reasons for disturbing their determination of the facts. But we ought not, in justice to the referees, to dispose of the question without adding, that we think the claim, to set aside the report upon any such ground, without the slightest foundation.

The judgment must be affirmed with costs.

KNAPP, et al., v. THE NEW YORK AND HARLEM RAILROAD COMPANY.

(Before DURE, BOSWORTH and SLOANSON, J. J.)
Heard, March 2d; decided, Dec. 12th, 1857.

CARY v. SAME & KNAPP, et al.

(Before BOSWORTH and WOODRUFF, J. J.)
Heard, June 11; decided, Dec. 12, 1857.

Morris and others agreed, with the Harlem Railroad Company, to construct an extension of their road from Dover Plains to Chatham Four Corners, for certificates of indebtedness, amounting to \$2,000,000, with interest warrants attached, payable out of a fund to arise from operating the extension; the surplus of its earnings, after paying its expenses, to be applied to paying the interest warrants semi-annually; and the company covenanted, that if the net earnings of the extension were not enough to pay the interest warrants, as they fell due,

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to "apply the gross receipts from the business over the present road, from and to stations thereon, to and from stations on," (the extension,) "so far as the same may be necessary for the payment of interest, to an amount not exceeding three-quarters of such gross receipts."

Held, that by the true meaning of the contract, (there being no net earnings of the extension, but on the contrary, the expenses of running the extension exceeded its earnings,) that the three-quarters of such gross receipts must be applied directly and solely to pay such interest warrants, and not to defray the expenses of running the extension, which its earnings were insufficient to satisfy.

Held, also, that the facts, that the company had settled with the certificate-holders, semi-annually, during a period of some three years, on the assumption that such gross receipts, to the extent of three-quarters thereof, were to be applied with the earnings of the extension, to pay its expenses, and only the surplus thus arising was to be applied to the payment of the interest warrants, and deferred warrants were issued for the residue, was no answer to an action to have the contract enforced according to its true meaning, as the company, by thus settling, had not paid as much as it was their legal duty to pay, and had not done, or engaged to do, any other act to their prejudice.

Held, also, that such settlements did not amount to a contemporaneous, or continuing practical construction of the contract, by which the certificate-holders were concluded, nor one which the Court was equitably bound to adopt or enforce, as they did not appear to have been made with knowledge of the particular facts of the case, or under such circumstances as to establish that such was, in fact, their view of the actual meaning of the contract, or that such was the view of the contractors, to whom the certificates were originally issued.

Held, also, that it was competent for the company, by an agreement between them and such contractors, made while the latter held such certificates, to become purchasers and owners of a part of such certificates, without the purchase of them by the company being treated as a satisfaction and payment thereof, in any such sense as that the holders of the residue, of those originally issued, would be entitled to the whole fund, for the payment of the interest warrants on their certificates, if required to make an amount sufficient to satisfy the same.

Held, also, that the company, by the true construction of the contract, were not personally liable for the payment of the certificates, and were only liable for the performance of the covenants on their part in relation to operating the extension and applying its net earnings, and doing other things, as in their contract they had covenanted and agreed to do.

THESE two actions are reported together, as they were argued upon the understanding, although heard at different General Terms, that all the Judges who heard the arguments would confer with each other, before deciding either of them. They did so confer, and both actions were decided at the same time. The case of Knapp, *et al.*, v. The Harlem R. R. Co. was commenced in December, 1855, and was tried before Bosworth, J., without a jury, in April, 1856, and now comes before the General Term, on

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an appeal, by the defendants, from the judgment rendered therein. The defendants are the parties of the first part, to a tripartite agreement, or trust conveyance, dated the 31st of October, 1849, and the plaintiffs are the parties thereto, of the second part, and Gouverneur Morris, George L. Schuyler and Sidney G. Miller are the parties of the third part.

The agreement recites, that the parties of the third part had contracted, with the parties of the first part, to construct and complete an "extension" of the railroad of the parties of the first part, from Dover Plains, in Dutchess County, its then terminus, to Chatham Four Corners, in Columbia County, for \$2,000,000 to be paid out of a fund to be created, as in said tripartite agreement is provided. This extension is called, in the subsequent proceedings, sometimes, "the Albany Extension," and sometimes the "new road," and the part previously constructed is called "the old road," or "present road." By the tripartite agreement, the plaintiffs were made grantees, and trustees, of the property which was to produce such fund.

To create such fund, the parties of the first part, when the extension was completed, were to extend the travel of their cars and engines over it, and furnish every thing necessary for that purpose. The parties of the first part were to keep full and accurate accounts, so as to show the whole expenses of running, both the old road and the new, and "the earnings and receipts" from the new road, and "also the receipts" (of the old road) "from the business, from and to stations on" (the new road) "to and from stations on the old road."

The fund, to pay interest on the cost of construction, and ultimately the principal, was to consist of "the whole receipts from all sources on the line of" (the new road), from which was to be deducted the expense of running it, and the residue was to be applied to pay interest warrants, issued in connection with certificates to represent such \$2,000,000 of indebtedness, and the rights of holders thereof, to be paid such part of said \$2,000,000 as the certificates expressed, and interest thereon, as stated in such certificates.

By the tripartite agreement, the parties of the first part covenanted, that, in case it should so happen that the net earnings of the new road, as before stated, should be inadequate to the pay-

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ment of interest upon the said certificates, "that they will apply the gross receipts from the business over the present road, from and to stations thereon, to and from stations on" (the new road), "so far as the same may be necessary for the payment of interest, to an amount not exceeding three-quarters of the whole of such gross receipts."

There were no net earnings from the new road. The cost of running it exceeded the receipts from it. And the main question in this action is, whether the three-quarters of such gross receipts were to be applied, first and directly, to pay interest, or to pay, first, the cost of running the new road, leaving only the residue, remaining after paying such expenses, to be applied upon, and in payment of such interest. The plaintiffs insist on the former, and the defendants on the latter, as the true construction.

The complaint alleges the incorporation of the defendants, and recites the act of incorporation, and the acts amending it, and states the execution of the tripartite agreement, and its provisions, according to the plaintiffs' view of their effect and meaning; and the contract between the said parties of the first and third parts, for the construction of the extension, sets forth the terms and form of the certificates and interest warrants to be issued, and that the defendants paid the interest warrants in full, as they fell due, up to the 1st of July, 1852, (the new road having been opened on the 1st of April, 1852,) and that, since said 1st of July, only partial payments have been made on such interest warrants; and that "deferred warrants" have been issued for such deficiency, and stating their amount. It states the amount of such "gross receipts," three-quarters of which were sufficient to pay interest, in full, if the plaintiffs' construction of the tripartite agreement is correct; and that the defendants had applied so much of such gross receipts as were necessary to pay the expenses of operating the new road.

The complaint further states: "That, by referring to the accounts from time to time, rendered to them by the defendants, the plaintiffs have ascertained that, instead of applying the said receipts to payment of said interest warrants, as by said deed required, the defendants have applied them, in the first instance, to the payment of such and so much of the running expenses of the Albany extension proper, (so called,) calculated upon the basis

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in the said conveyance specified, as was the amount of the excess of such expenses over the receipts from such Albany extension proper. That the defendants allege, that at no time have the receipts, of such Albany extension proper, exceeded the amount of the expenses, as contemplated in the said instrument; and defendants claim and insist, that, under the said contract, they are justified in applying such three-quarters gross receipts in the first instance, to the supplying of deficiencies in the accounts of such Albany extension proper."

It also alleges, that nearly all of the certificates, representing the cost of construction, had been assigned to third persons by said Morris, Miller and Schuyler, for value, and that such assignees and holders construe the tripartite agreement as the plaintiffs do, and one of them has brought a suit in this Court, against the present plaintiffs, for an accounting and payment of the interest-warrants, and that these plaintiffs are mere trustees, and have no interest in the event of this action. It prays a judgment, construing and determining the meaning of the contract, and for relief, in accordance with the construction which the plaintiffs claim to be the true one.

The defendants, in their answer, state, that their plan for the cost of the extension, was founded upon the value of the extension, as a separate property, involving no liabilities on their part, except to operate it, and account for the avails of the service, as provided by the agreement.

That it was their object, to retain the business of the old road from New York to Dover Plains, free from any liability for the expense of constructing or operating the new road. That, in order to carry out this plan, they entered into a contract on, and dated the 31st of October, 1849, "With Gouverneur Morris, George L. Schuyler, and Sidney G. Miller, to construct and complete a single-track railroad, with four miles of turnouts and branches, from the then terminus of these defendants' road at Dover Plains, to the line of the Albany and West Stockbridge Railroad, near Chatham Four Corners, in the County of Columbia, including the cost of grading, masonry, bridging, superstructure, dépôt buildings, water stations and fencing, and every thing necessary for a complete and perfect road, except the cost of engineering and right of way; which contract or agreement pre-

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scribed the mode and manner in which said road was to be constructed, and stipulated that the whole of the road to Chatham Four Corners should be completed by the fourth day of July, 1852.

"In consideration whereof, these defendants agreed to issue to the said contractors, Morris, Miller and Schuyler, certificates, under the trust conveyance hereinafter mentioned, for the sum of two millions of dollars, as the entire consideration for the erection, building, completing, and finishing the said railroad, with the dépôts, turnouts, dépôt buildings, fences and appurtenances, to be issued from time to time as the work progressed, upon the monthly estimates of the engineer of these defendants. The contractors agreeing, during the construction of the road, to provide for the interest warrants falling due in the mean time.

"And these defendants further say, that at the time of the execution of the said agreement, and pursuant thereto, these defendants made and executed a certain trust conveyance, bearing date the said thirty-first day of October, 1849," being the said tripartite agreement, a copy of which is annexed to the answer. A copy of the material parts thereof is hereinafter set forth, and marked Schedule "A."

They also say, that the contract and trust conveyance were delivered, and took effect at the same time, viz., on the 7th of September, 1850.

That the certificates and interest warrants were issued in the form originally agreed on, and as hereinafter set forth, and marked Schedule "B." That, after such contract and trust conveyance were executed, and before they were delivered, the defendants, to induce the contractors to deliver their contract, passed a resolution, dated the 23d of August, 1850, to receive from the contractors \$250,000 of such certificates, with the same rights, as holders thereof, as such contractors had. That, to bring negotiations to a close, and induce the contractors, Morris, Miller and Schuyler, to commence work without delay, the company agreed to purchase such certificates, to the amount of \$1,000,000, including the said \$250,000, and issue capital stock, in exchange, and such agreement bears date the 7th of September, 1850. The substance of its provisions is in Schedule "C," hereinafter set forth. That the contractors constructed the road, and certificates were issued, to the

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amount of the \$2,000,000, and the defendants did purchase, to the amount of \$1,000,000, as they had agreed to do, and now own them. Believing it for their interest to purchase still other certificates, the company passed a resolution, on the 24th of December, 1852, to purchase a further amount, equal to the unappropriated old stock of the company, payable, in the old stock, at par; and, under this resolution, they purchased large amounts, their whole purchases being \$1,533,500, which they now own, and the whole amount owned by third persons being \$466,500.

That the extension was completed, and opened for travel on the 1st of April, 1852. Interest warrants, pursuant to the arrangement, were paid, in full, to the 1st of July, 1852; after which their payment depended on the net earnings of the extension, according to the terms of the trust conveyance. When the extension was completed, the company began to operate it, and have, since done so, according to their contract, and have kept the accounts, as they agreed to do. In making up the accounts, they have credited to the extension the receipts from all sources on the line thereof, and have charged to it the actual cost of running it, as agreed upon; and the expenses exceeding the receipts, they have applied the stipulated gross receipts from business on the old road to the extent of three-quarters thereof. That the whole fund, so provided for payment of the interest, being insufficient, they have issued deferred warrants, from time to time, for the deficiency, bearing 7 per cent. interest, and payable from the first surplus of the fund, as provided by said trust conveyance.

They also allege, "That, pursuant to said trust conveyance, in the month of June, 1853, these defendants, under the direction of Robert Schuyler, their then president, made and rendered an account of said receipts and expenses, pursuant to the said trust conveyance, in the words and figures following, to wit:—

To the Trustees of the Albany Extension:—

GENTLEMEN,—The Directors of the New York and Harlem Railroad Company submit the first annual report of the operation of the Albany extension, in pursuance of the third section of the trust deed.

The opening of the road from Dover Plains to Chatham Four

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Corners took place on 1st April, 1852, by an arrangement and settlement made between the contractors and the company; and, from that date, the accounts of the transportation department have been arranged in the manner indicated by the trust deed, and the results will now be laid before you. By the settlement with the contractors, to which reference is made above, the interest warrants of the Albany extension certificates, payable in July, 1852, were paid in cash. After that date, the payment of the warrants depended upon the net receipts of the extension; these falling due on the 1st January of each year, from the earnings from 31st March to 30th September; and these due on the 1st July, from the earnings from 30th September to 31st of March, and the annual adjustment made to the last date.

With these explanations, the following statements will probably be easily understood.

The total steam service of the Harlem Road, from 1st of April, 1852, to 31st March, 1853, has been 591,276 miles as follows:—

	Miles.
On the old road, 1st of April to 30th Sept. 1852,	209,205
On the old road, 30th of September, 1852, to 31st March, 1853,	258,355
	<hr/> 487,560
On the extension, 1st of April to 30th Sep- tember, 1852,	63,583
30th September, 1852, to 31st of March, 1853,	60,133
	<hr/> 123,716
Total as above,	591,276

The current charges, for the above service, for the same period, amount to \$485,831.03, showing an average cost of each mile, run by steam, to exceed 82 cents, by a small fraction, which has been disregarded in the calculation. The extension service having been, as stated above, 123,716 miles, the current charges will amount to $123,716 \times 82 = \$101,447.12$. The receipts upon the Albany extension, and to and from stations on the old road, from 1st April, 1852 to 31st March, 1853, after deducting one-quarter of the joint business, as provided in the trust deed, have amounted

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to \$138,361.43, as follows:—Revenue from Albany extension for twelve months, say from 1st April, 1852, to 31st March, 1853, has been—

From old road and Albany Extension, viz.:—

Passenger fares,	.	.	.	\$86,526.06
Commutation,	.	.	.	522.50
				<hr/>
				\$86,048.56
Less $\frac{1}{2}$ off old road proportion,	.	.	.	16,512.14
				<hr/>
				\$49,536.42
From Albany Extension proper,	.	.	.	10,572.01
				<hr/>
				\$60,108.43
From old road and Albany Extension, viz., freight,	.	.	.	\$98,878.70
Less $\frac{1}{2}$ off old road proportion,	.	.	.	23,469.68
				<hr/>
				\$70,409.02
From Albany Extension proper,	.	.	.	7,848.98
				<hr/>
				72,258.00

Total revenue of Albany extension for twelve months,
ending 31st March, 1853, \$138,361.43

From these earnings, say \$138,361.43, have been deducted the current charges as above stated, 101,447.12

Leaving for interest warrants, \$36,914.31

The interest warrants which fall due on 1st January, 1853, were deferred under the provision for that purpose in the trust deed, as the current charges absorbed the entire receipts; but towards the warrants due on 1st July, 1853, the above balance of \$36,914.31 in cash, is now on hand.

The warrants due 1st July, 1853, amount to \$70,000.00

Or, 2000 warrants of \$35 each, upon each of which will be deferred \$16.55, amounting to \$3,100.00

And \$18.45 on each paid in cash, \$36,900.00

Absorbing the excess of the receipts over the current charges.

By order of the Board, ROBERT SCHUYLER, President.

Office of the New York and Harlem Railroad
Company, June 30, 1853."

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"And these defendants further answering, say, that pursuant to said statement, \$36,900 was paid, in cash, upon the interest warrants due 1st July, 1853, and deferred warrants were issued to the amount of \$33,000, in addition to the deferred warrants for \$70,000, for the interest warrants due 1st January, 1853, making \$103,100.

"That Robert Schuyler, the then president of these defendants, was a brother of George L. Schuyler, one of said contractors, and was also his partner in the firm of R. & G. L. Schuyler, and said statement was acquiesced in by the said contractors, as being made pursuant to the terms of said trust conveyance.

"That, in like manner, and upon the same principles, accounts were stated for the receipts of the fund for the six months ending September 30, 1853, (the termination of the fiscal year,) amounting to \$89,240.09
And the charges thereon to 60,688.88

Leaving applicable to coupons due January, 1854, . . \$28,554.21

"But the board of directors of these defendants directed \$35,000, or one-half of the amount of coupons, to be paid in cash, and deferred warrants to be issued for the remaining half, or \$35,000; the cash payment exceeding the amount standing to the credit of the fund on the book of these defendants by the sum of \$6,445.79.

"And these defendants further say, that from September 30, 1853, to September 30, 1854, the whole revenue accruing to the fund, from the several sources aforesaid, amounted to \$201,624.84
And the charges thereon to 171,392.43

Leaving applicable to interest due up to the 1st of January, 1855, \$30,232.41

"But the board of directors of these defendants directed the payment of \$35,000 at each of the half-yearly periods, and an issue of deferred warrants for the other half; being an excess of cash payment, over the amount actually realized, to the extent of \$39,767.59.

"And these defendants further say: That the condition of the fund to the first of January, 1855, was as follows, viz:—

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Deferred warrants issued January 1, 1853,	.	.	\$70,000.00
do.	July 1, 1853,	.	88,000.00
do.	January 1, 1854,	.	85,000.00
do.	July 1, 1854,	.	85,000.00
do.	January 1, 1855,	.	85,000.00

Total warrants to 1st January, 1855, \$208,100.00

Amount of cash paid over receipts, \$46,213.38

Less overplus, September, 1853, 1,481.00

46,199.07

Total deficiency, \$254,299.07

"And these defendants further answering, say: That, in the like manner, and upon the same principles, accounts were stated by these defendants, of the income and expenditures of the Albany extension, during the year ending on the 30th of September, 1855, showing the following results, viz:—

Total revenue, \$229,858.67

Expenditures, 168,794.67

Leaving applicable to interest, \$60,564.00

Out of which was paid upon the interest warrants

falling due July 1, 1855, 85,000.00

Leaving applicable to those due January 1st, 1856, \$25,564.00

The total amount of the year's interest being . . . \$140,000.00

And the amount applicable to its payment, 60,564.00

Deferred warrants were issuable for \$79,436.00

Of which amount, there were authorized to be is-

sued July 1, 1855, 85,000.00

Leaving to be issued January 1, 1856, \$14,436.00

"And these defendants further answering, say: That this addition of \$79,436 of deferred warrants, to the sum of \$254,299.07, the previous deficiency, makes the total deficiency to the 1st of January, 1856, of \$333,735.07.

"That, with these statements, they caused full and accurate accounts to be prepared and exhibited to said plaintiffs, pursuant to said trust conveyance, showing all the items of receipts and ex-

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penditures of said Albany Extension fund; and also of the current expenditures of the whole road, for operating and maintaining the same, in the manner hereinbefore stated, showing the average expense of each mile run by passenger and freight trains, and the number of miles run by steam power upon said extension, as well as upon the old road to Dover Plains, as required by said trust conveyance, to which statements these defendants pray leave to refer; copies whereof are hereto annexed, marked No. 1, No. 2, No. 3."

In their answer they further say, "That said statements and accounts are in all respects correct," that they have fairly applied all receipts from the business of the extension, and the three-quarters of the stipulated gross receipts from the said business of the old road, and have charged, only just expenses, to the extension fund. They admit that the contractors have sold to third persons for value, all, or nearly all of said certificates, but deny that such third persons construe the trust conveyance as the plaintiffs do, and allege that only one of them has brought a suit, and say, that no others have come in as plaintiffs. It admits the plaintiffs have no legal interest in the event of this suit, and avers that the defendants own, by purchase over three-fourths of the certificates, and prays that "the said complaint be dismissed with costs."

(No. 1.)

Summary of Albany Extension Revenue for the Year ending September 80, 1855.

Receipts from local traffic:—

Amount of passenger fares	\$11,480 35
" " freight receipts	18,596 78
	————— \$25,057 13

Receipts from Albany Extension and old road joint service:—

Three-fourths of gross receipts from fares	\$72,587 17
Three-fourths of gross receipts from freight	125,720 96

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Three-fourths of gross receipts from mails	4194 75
Three-fourths of gross receipts from expresses	1798 57
Total from Albany extension and old road joint service	<u>\$204,801 45</u>
Total revenue for the year	<u>\$229,358 58</u>

(No. 2.)

Summary of Albany Extension Charges for the Year ending September 30, 1855.

Total number of miles run by passenger and freight trains, by steam power, upon the whole road, 567,091, viz.:—

Upon the old road	418,905
“ “ Albany Extension	148,186
	<u>567,091</u>

Total expenditure for operating and maintaining the whole road, (not including new or additional engines, cars, etc., except to keep the valuation thereof equal to the original cost,)	<u>\$756,816 09</u>
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Less the amount chargeable to City and New Haven lines	<u>110,858 04</u>
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Net amount chargeable <i>pro rata</i> to old road and Albany extension	<u>\$645,958 05</u>
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Chargeable to old road at \$1.13 $\frac{1}{2}$ per mile, or as 567,091 : \$645,-
958.05 :: 418,905 to . . . \$477,168 88

Chargeable to Albany Extension at \$1.13 $\frac{1}{2}$ per mile, or as 567,-091 : \$645,958.05 :: 148,186 to . . .
<u>163,794 67</u> <u>\$645,958 05</u>

(No. 3.)

Statement of the Albany Extension Interest Fund after Provision for Coupons becoming due January 1, 1856.

Amount of revenue as per statement No. 1	\$229,858 67
Amount of charges as per statement No. 2	168 794 67
Leaving applicable to interest, —————	\$60,564 00
Amount of coupons due July 1, 1855.	70,000 00
Amount of coupons payable January, 1856	70,000 00
	—————
	140,000 00
Deficiency for the year	79,436 00
Deficiency September 30, 1854	254,299 07
	—————
Total deficiency of the fund	\$383,735 07
Amount of deferred warrants authorized up to and including January 1, 1855	208,100 00
Amount of deferred warrants authorized for July 1, 1855	85,000 00
Amount of deferred warrants to meet deficiency, January 1, 1856	44,440 00
Amount of cash advanced and authorized to be advanced beyond the amount received, up to and including present year.	46,195 07
	—————
	\$383,735 07

No witness was examined by either party on the trial of this action. The papers, the substance whereof is hereinafter set forth, as schedules A B and C, were read in evidence, and it was admitted they were delivered and exchanged at the same time. Schedules A B and C are as follows, viz.:—

(A.)

"The New York and Harlem Railroad Company, to Shepherd Knapp, Alexander H. Holley, and Morris Ketchum.

TRUST CONVEYANCE.

"This Indenture, made this thirty-first day of October, one thousand eight hundred and forty-nine, between the New York and Harlem Railroad Company, of the first part; Shepherd Knapp, of the City of New York, Alexander H. Holley, of Larkville, Connecticut, and Morris Ketchum, of the City of New York, of the second part; and Gouverneur Morris, of Morrisania, and George L. Schuyler and Sidney G. Miller, of the City of New York, of the third part."

It then recites the making of an agreement, of the same date, between the parties of the first and third parts, by which the latter agree to construct and complete the extension for \$2,000,000, for which, as they may be entitled thereto, the parties of the first part are to "issue certificates, in sums of \$500 and \$1000, chargeable upon the fund hereinafter provided, with interest for the same in the manner, and from the fund herein provided," on presentation of the interest warrants.

That to secure the payment of said \$2,000,000, and the interest to grow due, the parties of the first part have agreed to convey, to those of the second part, as trustees, the road so to be constructed.

By it, the parties of the first part then convey, to those of the second, and the survivors of them, the track of the extension, the dépôts, dépôt-buildings, engine houses, and other improvements and constructions then on it, or to be put on it, with all income, emoluments, rights, franchises, rents, issues and profits, etc., etc., with the appurtenances. To have and to hold the same, etc., as joint tenants, subject to the conditions, etc., hereinafter contained; and it then provides, that if the parties of the first part shall pay, to the holders of the certificates, \$2,000,000, and interest according to the certificates, "at the times, and in the manner, and out of the proceeds and earnings of said road, as hereinafter provided;" then the said agreement shall be void, and the estate granted by it shall cease, and be void. It then proceeds, in the words following, viz.:—

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"And it is hereby mutually covenanted and agreed, by and between the said parties to these presents, and this present Indenture, and the said certificates, are hereby declared to be made, contracted, and issued, upon the terms and conditions following, that is to say:

"First.—The said parties of the first part covenant and agree, to and with the said parties of the second part, that when, and as soon as the said parties of the third part shall build, complete, and finish the said railroad, between said points hereinbefore mentioned, or any part thereof which can be advantageously used for the transportation of freight and passengers, that they, the said parties of the first part, will forthwith extend the travel of their cars and engines over the same, and use their best endeavors to render the same productive and profitable.

"Second.—The said parties of the first part covenant and agree, to furnish the motive power, cars, and machinery, necessary to operate and maintain the said part of said road, and to conduct, manage, and arrange the system of business upon said road so as to exhibit clearly and distinctly, from time to time, to the parties of the second part, the earnings and receipts of that part of said railroad hereinbefore described, and also the receipts of the present road, from the business, from and to stations on that part of the road herein described, to and from stations on the present road, in order that the whole income, of and from the road herein described, may be ascertained.

"Third.—The said parties of the first part further covenant and agree, to keep the accounts of the current expenses of the whole road, for operating and maintaining the same, distinct and separate from capital accounts, so that the treasurer may annually exhibit to the parties of the second part the total expenditures for operating and maintaining the whole road, (not including new or additional engines, cars, etc., except to keep the valuation thereof equal to the original cost,) so as to average the same upon each mile run by passenger and freight trains, by steam power, upon the whole road, and thereby ascertain the amount chargeable against the income of that part of the road hereinbefore described.

"Fourth.—The said parties of the first part further covenant and agree, to credit to that part of the road hereinbefore described, the whole receipts from all sources on the line thereof; and to

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charge thereto the actual cost of the number of miles run thereon, by freight and passenger cars, at the average cost per mile on the whole road, to be ascertained as hereinbefore provided, and to appropriate the residue to, or towards, the payment of the interest warrants on the said certificates, as the same shall become due and payable.

“*Fifth.*—The said parties of the first part further covenant and agree, that in case it should so happen, that the net earnings of that part of the road, herein before described as above stated, should be inadequate to the payment of the interest warrants upon the said certificates, that they will apply the gross receipts, from the business over the present road, from and to stations thereon, to and from stations on that part of the road herein described, so far as the same may be necessary for the payment of interest, to an amount not exceeding three-quarters of the whole of such gross receipts.

“*Sixth.*—The said parties of the first part further covenant and agree, that in case the whole fund, as above provided, for the payment of interest, shall be inadequate to the payment thereof, that they will issue to the holders of interest warrants, respectively, new warrants for so much as shall remain unpaid, bearing interest at seven per cent. per annum, to be paid, in whole or in part, from the first surplus of the fund to be provided as aforesaid, after paying and discharging the interest warrants falling due, and those in arrear, until all such arrears shall be paid off and satisfied.

“*Seventh.*—It is further understood and agreed, by and between the parties to these presents, that each year's receipts and payments, when interest is paid in full on such certificates, shall be closed, and no subsequent deficiency of the fund for the payment of interest shall be charged upon the surplus of any previous year.

“*Eighth.*—That the said parties of the first part further covenant and agree, that in case at any time the interest shall be in arrear upon said certificates for two whole years, that a meeting may be called, by the parties of the second part, of the holders of said certificates, at which the holder of every five hundred dollars, of said certificates, shall be entitled to one vote; and in case a majority, in amount, of such holders shall, by resolution, so direct, the said parties of the second part shall enter upon and take possession of all and singular the premises hereby granted and conveyed; and

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shall grant, bargain, sell, and dispose of the same, giving due notice, according to law, of the time and place of such sale, in two of the public newspapers in each county through which the said road passes, and serving like notice, with a copy of the minutes and resolutions of such meeting, upon the said parties of the first part. And the parties of the first part covenant and agree, to surrender possession of the said premises to the purchaser or purchasers, at any such sale, unless the said purchasers shall elect to continue the foregoing arrangement to work the road, as provided in the next section.

“*Ninth.*—The said parties of the first part, further covenant and agree, that the purchaser or purchasers, at any such sale, shall be entitled, if he or they signify his or their election to do so within sixty days after such sale, to all the benefits and advantages of the foregoing covenants and agreements for the operating and maintaining the said road hereinbefore described, and for the payment of the income thence arising to such purchaser or purchasers, to be ascertained and adjusted as hereinbefore provided.

“*Tenth.*—It is hereby expressly understood and agreed, that said certificates shall be issued by the said parties of the first part to the said parties of the third part, or their assigns, and shall be transferable by either of the said parties of the third part; and each of the said parties of the third part is hereby expressly authorized and empowered, by the others, to make such transfer, by executing an assignment of such certificates, or any of them, in his own name, on behalf of himself and the others of the said parties of the third part, endorsed upon such certificates.

“*Eleventh.*—And it is further mutually understood and agreed by and between all the parties to these presents, that in case of non-payment of the principal of said certificates on the first day of July, in the year of our Lord one thousand eight hundred and seventy-two, the holders of the said certificates, or a majority of them, at such meeting, to be called as hereinbefore provided, in the eighth article of this indenture, shall be authorized, by resolution, to direct the said parties of the second part to enter upon and take possession of the said hereinbefore granted and described premises, and to grant, bargain, sell, and dispose of the same, giving due notice of the time and place of such sale, according to law; or the said holders, at their option may, by a like majority,

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agree to extend the same arrangement for operating and maintaining the said portion of the road hereinbefore described, for the further term of twenty years, upon the same conditions and provisions for the application of the net receipts thence arising; and the said parties of the first part shall, in that event, be subject to the same liabilities and covenants, and entitled to all the privileges and advantages hereinbefore specified, limited and contained. And in case of a sale of said premises, as hereinbefore mentioned, the said parties of the first part shall give possession to the purchaser or purchasers, at any such sale, unless such purchaser or purchasers shall elect within sixty days, as provided in the ninth article of this agreement, to avail himself of the covenants and agreements herein contained, for the working of said road, by the parties of the first part; in the event of which election, all the covenants and agreements hereinbefore contained, in relation to the operating and management of said road, shall be continued for the benefit of the purchaser, and the parties of the first part, as hereinbefore contained.

Twelfth.—And it is hereby further declared and agreed, by and between all the parties to these presents, that in case the said parties of the third part fail to perform their agreement, or abandon their contract, after partially executing the same, and after the issue and transfer of any part of the certificates hereinbefore mentioned, the said parties of the first part may declare said contract to be forfeited, and shall notify the parties of the second part thereof; and thereupon the said parties of the second part shall forthwith call a meeting of the holders of such certificates, as hereinbefore provided; and the holders of said certificates or the majority of them, shall have the right to assume said contract, either by themselves or by such of them as may be designated and appointed by said meeting; who shall thereupon enter into suitable and proper agreements with the said parties of the first part, to be approved by the parties of the second part, to continue and complete the said road, according to the said contract and specifications, upon the terms and conditions therein expressed, and for the consideration of the residue of the certificates then unissued.

“In witness whereof, the said parties to these presents of the first part have caused their corporate seal to be hereunto affixed;

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and the said parties of the second and third parts have hereunto set their hands and seals, the day and year first above written." (It was signed and sealed by each of said parties.)

The certificates to be issued to the contractors, and secured by the Trust Conveyance above set forth, are as follows:—

(R.)

Albany Extension of the New York and Harlem Railroad.

No.	\$1000
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This certifies, that Gouverneur Morris, Sidney G. Miller and George L. Schuyler, for the construction of the Albany Extension, are entitled to an undivided interest of one thousand dollars, in the sum of two millions of dollars, secured by a certain deed of trust, (hereby declared to be part and parcel of this certificate, as if recited herein,) made by the New York and Harlem Railroad Company, of the first part, Shepherd Knapp, Alexander H. Holley and Morris Ketchum, of the second part, and the said Morris, Miller and Schuyler, of the third part, dated the thirty-first day of October, 1849. Also, that the said sum of one thousand dollars is payable to them or their assigns on the first day of July, 1872, in the manner, and from the fund, in said indenture declared, together with interest thereon at the rate of seven per centum per annum, on the first day of every January and July ensuing the date hereof, upon presentation of the interest warrants hereto annexed, as the same severally become due, at the office of the New York and Harlem Railroad Company in the City of New York, according to the provisions of the aforesaid trust deed.

In witness whereof, the New York and Harlem Railroad Company, by resolution of the Board of Directors,

[L. S.] passed on the 10th day of September, 1850, have caused these presents to be sealed with their corporate seal, and signed by their President; and the said Trustees have also hereunto set their hands this first day of October, 1850. ROBERT SCHUYLER, President.

Countersigned, SHEPHERD KNAPP,

A. H. HOLLEY,
MORRIS KETCHUM, } Trustees.

[*Form of forty Interest Warrants annexed.*]

The New York and Harlem Railroad Company will pay the bearer hereof thirty-five dollars on the first day of July, 1857, for interest to that date on certificate of said Company No. for one thousand dollars, dated 1st October, 1850, from the fund specified in the deed of trust dated 31st October, 1849, and referred to in said certificate.

—————, Treasurer.

(C.)

"This agreement, made the seventh day of September, 1850, between the New York and Harlem Railroad Company, of the first part, and Gouverneur Morris, Sidney G. Miller and George L. Schuyler, of the second part."

It recites, the making of the contract for constructing and completing the extension, the making of the tripartite agreement, and by it, the parties to it agree, first, that, when the extension is completed and accepted, the company will purchase any and all certificates issued under the tripartite agreement, which may be tendered to them, and give in exchange ten shares of capital stock for each certificate of \$500, and twenty for each one of \$1000, until such purchases shall reach \$1,000,000, or 20,000 shares of said capital stock.

Second.—The purchases shall be made in the order the certificates are presented, and the privilege of so exchanging is to continue five years, unless the \$1,000,000 is sooner taken up.

Third.—The certificates are to be accompanied with the interest warrants from the last preceding payment of interest, and the stock so exchanged is to be entitled to future dividends, but not to any privilege over stock previously issued.

Fourth.—The certificates, to the amount of \$250,000, to be assigned, under the resolution of the 23d of August, 1850, are to stand on the same footing as any other, as to the provisions of this agreement, but are not to increase the whole purchase under it, above \$1,000,000.

Fifth.—The parties of the second part may exclude any certificates, except those mentioned in the fourth article, from the

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benefits of this agreement, by an endorsement to be made on them to that effect.

Sixth.—Such purchase of the certificates is not to be a payment of them; on the contrary, the company, as holders of them, are to have the same rights, in every respect, as the parties of the second part would have, if continuing actual owners.

Seventh.—The contract for building the extension is so modified, that it is to be commenced forthwith, and twenty-two miles, from Dover Plains, finished by the 4th of July, 1851, and the residue by the 4th of July, 1852. It was signed and sealed by each of the parties to it.

The printed case, on which this appeal was heard, contained the pleadings, and the papers and agreements hereinbefore set forth, at length; the judgment rendered, (which it is unnecessary to insert,) the opinion accompanying the decision at Special Term, the notice of appeal, and the following "case and exceptions, viz.:—

"SUPERIOR COURT.

"*Shepherd Knapp, Morris Ketchum, and Alexander H. Holley,
against The New York and Harlem Railroad Company.*

Case and Exceptions.

"This cause was brought to hearing before the Honorable Joseph S. Bosworth, on the 24th of April, 1856, at a Special Term of this Court, held at the City Hall of the City of New York.

No witness was examined by either party. The trust conveyance of the date of October 31st, 1849, with the certificate annexed thereto, and the agreement of the 7th of September, 1850, copies whereof are annexed to defendants' answer, as Schedules A, B and C, were admitted and read in evidence. It was also admitted, that they were delivered and exchanged at the same time.

The accounts, reports and statements, set forth in the complaint and answer, were also admitted and read in evidence.

It was also admitted, that they were made out at or about the time they severally purport to have been made, and were accessible and open at all times, to be inspected by any party interested therein; and that the defendants settled, from time to time, with

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the certificate-holders, on the basis and terms thereon stated; but it was not admitted, that the paper, contained in the answer of the date of June 30th, 1858, purporting to be a letter or report to the trustees, had been served on them personally.

It was also admitted, that the said statements of the receipts from the Albany Extension, and of the expenses of running it, as so made up and read in evidence, were substantially correct, assuming the basis on which they were made to be the true one.

It was also admitted, that the defendants had become the purchasers and owners to a large amount of such certificates, in the manner, and under the circumstances stated in the defendants' answer.

It was stated by counsel of both parties, that the questions to be decided, were deemed to be questions of law, and were, in substance:—

1. What is the proper construction of the agreement of the date of the 31st of October, 1849?
2. Are the plaintiffs, and those they represent, estopped from insisting upon any construction different from that on which the accounts had been made up, and on the basis of which the claims for interest have been settled with the holders of the certificates?
3. Are the defendants liable, as principal debtors, for the payment of the principal or interest of the certificates?
4. Have the defendants, as holders and owners of a part of the certificates, which they had so purchased, the same rights in respect thereto, as the original holders? or, are the certificates to be treated as extinguished from the time of the defendants' purchase thereof?

After hearing counsel for the respective parties, and deliberating thereon, the Court, on the facts admitted by the pleadings, and so admitted on the trial as aforesaid, did decide, as matter of law, as follows:—

1. The accounts should be made up so as to credit to the extension all earnings from the business, beginning and ending in its *termini*, and also its just proportion of receipts from business, from and to stations on it, to and from stations on the old road.
2. The gross receipts mentioned in the fifth article, to the extent of three-quarters thereof, if so much be necessary, are to be

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applied directly to pay the interest, which the net earnings of the extension may be inadequate to pay.

3. The holders of the outstanding certificates are entitled, to have the account for each year stated, so as to show what portion of the gross receipts for each year, would be applicable to them; and their proportion of the surplus, of any one year, is to be applied to meet the deficiency of any previous year, until the interest on such certificates shall have been paid in full.

4. There is no personal obligation on the part of the company to pay the principal of the certificates, or the interest; and the company has the same rights, in respect to the certificates transferred to it, in exchange for its stocks, as the original holders had to participate in the fund created to pay interest, and as security for the costs of construction.

The defendants did, thereupon, except, then and there, to each of the three first of the said conclusions of law, separately, in due time and form."

On the 10th of July, 1856, a judgment was entered, on behalf of the plaintiffs against the defendants, in conformity with the foregoing decision, and it is from that judgment that the appeal, in this action, is taken.

This appeal was heard in March, 1857, before Duer, Bosworth and Slosson, J. J.

The suit of *Cary v. The Harlem Railroad Company, and Knapp, et al.*, was commenced on the 25th of September, 1855, was tried before Hoffman, J., without a jury, in May, 1856, and it came before the General Term, on an appeal by the plaintiff, from a part of the judgment, and on an appeal by the Harlem Railroad Company from the whole judgment entered therein. It is brought by the said Cary, as plaintiff, "as well on his own behalf, as in behalf of all other persons," holding any of these certificates, "who may come in and be made plaintiffs, according to the course and practice of this Court, and contribute to the expenses thereof," against the New York and Harlem Railroad Company, and Shepherd Knapp, Alex. H. Holly and Morris Ketchum, as defendants.

It is brought by Cary, as the holder and owner of such certificates, alleged to amount to about \$14,000. He insists upon the

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same construction, of the tripartite agreement, as Knapp and others did, in the suit brought by them, and in his complaint "prays, that the said New York and Harlem Railroad Company may come to a full account, in the premises, with the holders of said certificates, and said trustees, and may pay over to such trustees all sums of money which may then be found in their hands, applicable to said certificates, and that said trustees may pay to the plaintiff, and the holders of said certificates, such sums as they may be, severally, entitled to receive, and that said New York and Harlem Railroad Company, may be compelled to keep books of account, according to the true intent and meaning of said trust deed, or that the said trustees, on any default of the New York and Harlem Railroad Company appearing in the premises, be directed, by the order of this Court, to sell at public auction, all, and singular, the premises, rights and interest so conveyed to them, and constituting a fund for the protection of the said certificates, and apply the same accordingly, or that the plaintiff may have such other and further relief as the case may require, with his costs."

The defendants, severally, answered the complaint. Their answers contain no material allegations, not found in their pleadings in the action first mentioned. On the trial, the same papers were put in evidence, which are marked, in the first entitled action, as Schedule A, B, C, and Nos. 1, 2, 3. The defendants admitted that the plaintiff was a stockholder of the New York and Harlem Railroad Company, and owned one or more of the said certificates.

A report of the company, dated October 4th, 1850, was read in evidence, and proved to have been printed and distributed to the stockholders, declaring, among other things, that by the plan of the extension, it is treated as a separate property, as if it were to be constructed by a new company, under a different charter; and that, by such plan, the old road remained free from liability for expenses or interest on the debt; and that the old stock had a new source of probable profit opened to it, free from all danger to the present resources of dividend, with an option of placing the extension on the same footing as the old road, by paying \$2,000,000.

The original of the aforesaid paper, dated June 30, 1853, and signed "Robert Schuyler, President," was proved to be in the

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handwriting of said president, and it was, also, proved, that he resigned his office in August, 1853.

Correspondence between the plaintiff and the Harlem Railroad Company, commencing on the 22d of September, 1855, and some statements, of the income and expenses of the Albany Extension, made in consequence of such correspondence, were put in evidence, but they contain nothing affecting the decision of the main questions in controversy.

The facts found by Judge Hoffman, and his conclusions of law thereon, are as follows:—

"First."—The defendants, the Railroad Company, were empowered, by an Act passed March the 6th, 1849, for the purpose of completing their road to the Hudson River, opposite to the City of Albany, to increase their capital stock to an amount not exceeding \$5,000,000, to be paid out of the earnings of the road, when the same shall be completed, and in the mean time, they might borrow, from time to time, for the purpose aforesaid, money, not exceeding in the whole, \$2,000,000, at a rate not over 7 per cent., and might give to the holder of any bond, or evidence of debt, issued for any part of such loan, the privilege of converting the same into the stock, to be issued under the act; or, before the maturity of the loan, they might also secure the payment of the loan, by mortgage of any part of their real and personal estate.

"Second."—The company did not carry out the act in the manner contemplated, by a direct borrowing of money, which went into its own hands, and was employed directly in building the road, but resorted to a special contract and arrangement.

"Third."—Such special contract and arrangement is fully set forth and specified in the trust conveyance, certificate, and agreement, to the answer of said defendants, the railroad company, annexed, marked schedules A, B and C, and set forth in this case, which said conveyance and agreement were delivered, and took effect, on the 7th day of September, 1850, and not till then.

"Fourth."—The contractors therein mentioned, viz., Morris, Miller and Schuyler, did, thereupon, enter upon said work, and completed the same, pursuant to agreement, on the 1st of April, 1852, on which day said road was delivered to said railroad company, and has been run and used by them ever since, as in said conveyance and agreement was required.

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"Fifth.—Prior to, and on said 2d day of April, 1852, certificates were issued to said Morris, Miller and Schuyler, as therein required, to the amount of \$2,000,000, with interest warrants annexed, which said certificates and warrants were in the form in said schedule required, and not otherwise, and the interest in said certificates was duly paid up to, and including the first day of July, 1852.

"Sixth.—The said defendant, the railroad company, pursuant to the said supplemental agreement, upon the completion of said extension of said railroad, did purchase \$1,000,000 of said certificates, upon the terms and conditions therein mentioned, and thereupon became the holders thereof, and they have, from time to time, purchased, from the holders of said certificates, an additional amount thereof, and have paid for the same in the old stock of said defendants, at the par value thereof, or otherwise; and said defendants are now the holders of said certificates, to the amount of \$1,583,500, the amount held by the plaintiff, and all other persons, being \$466,500, and no more.

"Seventh.—The defendants made no payment of any of the interest warrants, due on the 1st of January, 1853, on the ground, that the current charges of operating said Albany Extension, so called, absorbed all the income, or fund, in said trust conveyance mentioned, during the period of six months then preceding.

"Eighth.—At the end of every six months then ensuing, a statement of the said receipts and expenditures was made on the principle of the defendants, and, on the basis of such statements, payments were made on the interest warrants, and deferred warrants were issued. The following were said receipts and expenditures, and said payment of interest and deferred warrants, as made out and adjusted by the defendants, viz., for twelve months, ending July 1, 1853:—

"RECEIPTS.

From old way and extension,	\$119,945	44
From the extension,	18,415	99
<hr/>							
Total receipts,	\$138,361	43
Expenditures,	101,447	12
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Leaving a surplus of	\$36,914	31

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Interest warrants paid,	\$86,900 00
Deferred warrants issued,	108,100 00
	<hr/>
	\$140,000 00
For six months ending January 1, 1854, receipts were \$89,240 09	
Expenditures,	60,688 88
	<hr/>
Leaving a surplus of	\$28,551 21
Interest warrants paid,	\$85,000 00
Deferred warrants issued,	85,000 00
	<hr/>
	\$70,000 00
For the year ending January 1, 1855, receipts were \$201,624 84	
Expenditures,	171,392 43
	<hr/>
Leaving a surplus of	\$39,232 41
Interest warrants paid,	\$70,000 00
Deferred warrants issued,	70,000 00
	<hr/>
	\$140,000 00
For the year ending January 1, 1856, receipts were \$229,358 67	
Expenditures,	168,794 67
	<hr/>
Leaving a surplus of	\$60,564 00
Interest warrants paid,	\$60,564 00
Deferred warrants issued,	79,436 00
	<hr/>
	\$140,000 00

"Ninth.—According to the statements of the defendants, the whole amount of interest warrants, which fell due during the said time, to wit: from July 1, 1851, to January 1, 1856, was \$490,000. The whole amount of receipts, during said period, was \$658,585.08. The whole amount of said expenditures, during the said period, was \$502,823.10. The whole amount paid, during the said period, on said interest, was \$202,464, and the whole, deferred warrants, issued was \$287,536.

"Tenth.—Accounts of said receipts and expenditures were made out, during said period, every six months; to wit: on the 1st day of January and July in each year, and the certificate-holders received, respectively, their share of said payments of interest, and

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said deferred warrants, at, or about, the several times when the said interest became due."

"CONCLUSIONS OF LAW.

"And my conclusions of law, upon such facts, are as follows:—

"First.—That, according to the true construction, meaning and intent of the trust deed, bearing date the 31st of October, 1849, made by and between the New York and Harlem Railroad Company, of the first part, Shepherd Knapp, Morris Ketchum and Alexander H. Holley of the second part, Gouverneur Morris, Sidney G. Miller and George L. Schuyler, of the third part, the payment of the principal and interest of the certificates therein mentioned, and known as the Albany Extension Certificates, is entirely dependent upon the fund provided in the trust deed, and that there is no obligatory liability, on the part of said railroad company, to pay the principal or interest of said certificates, beyond the obligation to administer the fund properly, according to the provisions of said trust deed.

"Second.—That the accounts required to be kept by the said company, and exhibited to the said trustees, are to be made up so as to credit to that part of said road, called the Albany Extension, from Dover Plains to Chatham Four Corners, all earnings and receipts, beginning and ending within its *termini*, and, also, all such, and so much of the receipts from business, beginning upon it and ending upon the old road, or beginning upon the old road, and ending upon it, as is the proportion of the number of miles run upon the Albany Extension, in earning such receipts, to the whole number of miles run in so earning them, and to charge thereto the whole expenses of running and operating said extension.

"Third.—That, by the true construction of said trust deed, the gross receipts, mentioned in the fifth article thereof, are the receipts from business begun upon the old road, and ended upon the extension, or begun upon the extension and ended upon the old road, after deducting the proportionate share of the Albany extension as aforesaid, and that three-quarters thereof, if so much be necessary, are directly applicable to the payment of the interest warrants upon the Albany Extension Certificates, which the net earnings of the Albany Extension may be inadequate to pay.

"Fourth.—That it is competent and legal for said railroad com-

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pany to purchase any of said certificates, and to hold the same, and the said railroad company have a right to retain such of said certificates as are now held by them as in full force and effect, and to receive the dividends of interest thereon, the same as any other holder thereof.

"*Fifth.*—That such of said certificates as are now so held and retained by said railroad company, are not merged and extinguished, in whole or in any part thereof, but the same are in full force and effect.

MURRAY HOFFMAN."

The plaintiff excepted to the first, fourth and fifth heads, or propositions, of the said decision.

The New York and Harlem Railroad Company excepted to the second and third of the said heads, or propositions, of such decision.

A judgment was entered, conforming to the decision. The plaintiff appealed from so much of it as adjudged the points of the decision to which he had excepted. The Harlem Railroad Company appealed from the whole judgment.

The appeals in this action were heard before Bosworth and Woodruff, J. J., in June, 1857.

John Anthon and *Wm. Henry Anthon*, for plaintiff Cary, made and argued, in support of the appeal taken by him, the following points:—

I. In taking the accounts, in addition to the application of the gross receipts, the certificates bought up by the company ought to have been treated as paid; and then it will result, that the entire fund created for the payment of the interest on the \$2,000,000 certificates must be devoted exclusively to the payment of the interest on the certificates held by plaintiff, and is quite sufficient for that purpose.

II. The agreement between the company and the persons from whom they purchased the certificates, which they, by virtue thereof, claim to hold as liens on this same fund, not being sanctioned by the trustees proper, in whom the title was vested, cannot affect the rights or equities of the plaintiffs. The rule of *non merger*, as invoked in the opinion of the Judge, is incorrect, or does not apply. (*Mead v. York*, 2 Seld. 450–452; *Truscott v. King*, Id. 163; *Van Scooter v. Lefferts*, 11 Barb. 140.)

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III. If such agreement is valid, and if the company has the right to hold such certificates by virtue of such agreement, as liens on the fund, that agreement extends to one million of dollars only, and to the certificates for that amount, and no more. (Vide agreement between the company and the contractors, 7 Sept., 1850.)

IV. The judgment ought to be amended by directing the entire exclusion, from the account, of all the certificates paid off in any-wise by the New York and Harlem Railroad Company, or of all except one million, and affirming it in every other particular.

John W. Edmonds and *Charles W. Sandford*, for the Harlem Railroad Company, made and argued the following points:—

Two main questions are raised in the case:—

First, are the certificates which the railroad company hold extinguished by the transfer to them, or are they still valid and outstanding in their hands, to the same extent as the certificates held by others?

[This question was decided at Special Term, in favor of the claim of the railroad company.]

Second, has the railroad company made a proper disposition of the funds provided for the payment of interest on the certificates?

[This question was decided at Special Term against the railroad company.]

The defendants, the railroad company, have appealed on the second point, and the plaintiff has appealed on the first point. The trustees have not appealed from any part of the order.

FIRST POINT.

The extension certificates, held by the railroad company, are as valid and outstanding, in their hands, as those held by the plaintiff, or any other person.

I. None of the certificates were issued until after the agreement of the 7th of September, 1850, between the railroad company and the contractors.

II. By the sixth clause of that agreement, it was stipulated that the certificates which the railroad company might hold,

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should be valid and outstanding in their hands, and not be cancelled or discharged by their holding them.

III. The certificates were all issued, in the first instance, to the contractors, who were parties to that agreement; and this plaintiff, and all other holders, obtained their certificates from said contractors.

IV. All the holders, therefore, took them, subject to all the equities existing between the original parties.

V. Between the original parties, it was expressly agreed that they should be valid and existing in the hands of the railroad company, and they became equally so, as to all persons holding under those original parties.

VI. The doctrine of merger does not apply, for two reasons: 1. The railroad company were never the primary debtor for the amounts mentioned in the certificates, nor in any manner ever responsible to the holders for the payment of them. 2. But even if they had been, they had a right to prevent a merger, and did so prevent it, by their avowed intention so to do. (*Mechanics' Bank v. Edwards*, 1 Barb. 271; *S. C.* 2 Ib. 545; *Forbes v. Moffatt*, 18 Ves. 384; 4 Kent Com. (3d Ed.) 102; *Gardner v. Astor*, 3 J. C. R. 53; *Starr v. Ellis*, 6 Ib. 393; *Clift v. White*, 2 Kern. 532; *Hill v. Bebee* 3 Ib. 566; *Buller v. Miller*, 1 Comst. 496.)

SECOND POINT.

The receipts, mentioned in the fourth and fifth clauses of the Trust Conveyance, constitute a fund applicable, first, to the payment of expenses, and then to the payment of interest on the certificates.

I. Three-quarters, in amount, of the holders of the certificates do now claim that, as the true construction of the instrument.

II. All the certificate-holders, the original contractors to whom the certificates were issued, and the trustees, have acquiesced in the same construction. And, upon the faith of that acquiescence, the railroad company has made payments and advances it was not bound to make. (*Sherman v. Sherman*, 2 Vern. 276; *Willis v. Jernegan*, 2 Atk. 252; *Ticket v. Short*, 2 Ves. Sen. 239; *Murray v. Toland*, 3 J. C. R. 575; *Freeland v. Hiron*, 7 Cranch, 147; 1 Green. Ev. § 27, § 207, § 208.)

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III. By this acquiescence of the other parties, and the acts of the railroad company, the holders of the certificates are now estopped from questioning our construction of the instrument.

IV. But the true construction is, that contended for by the railroad company. It was never intended to impose the risk of the "Albany Extension," its construction or its subsequent ability to pay its own expenses, upon the railroad company, but solely upon the contractors, and those to whom they transferred their certificates.

Hiram Ketchum and Hiram Ketchum, Jr., for Knapp, et al.

On the 12th of December, 1857, judgment was pronounced in both actions, by Slosson, J., in *Knapp, et al. v. The Harlem Railroad Company*, and by Woodruff, J., in *Cary v. The Harlem Railroad Company*, and *Knapp, et al.*

The following opinions were delivered:—

SLOSSON, J.—The questions involved in this case principally arise, upon the construction to be given to the trust deed of October the 31st, 1849. If its provisions are free from ambiguity, it will be unnecessary to look beyond it.

The general purpose of the deed is, to provide a fund for the payment of the annual interest, upon the sum, for the consideration of which the contractors had undertaken to construct the extension of the road from Dover Plains to Chatham Four Corners, and to mortgage the extension itself, with its dépôts, buildings, engine-houses, and other improvements and constructions, for the eventual payment of the principal, in July, 1872.

The deed contains no covenant, on the part of the Company, to pay the principal, nor for the payment of the interest, except by a proper application of the fund provided for that purpose.

There is, therefore, no personal obligation on their part, in respect to the payment of the principal; and the only recourse of the certificate-holders, in case of default on the part of the company to pay the principal, when due, is by a foreclosure of the road itself, in the manner prescribed by the deed.

The fund appropriated to the payment of the interest, consists, first, of the "net earnings" of the business, to be done on the

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line of the extension itself; and, second, if that be insufficient, of three-quarters of the "gross receipts" arising from the business over the old road, from and to stations thereon, to and from stations on the extension, as hereinafter more fully explained.

By the term "net earnings," is intended the surplus of the "receipts from all sources," as expressed in the fifth article, on the line of the extension, after charging, against such receipts, the actual cost of running or operating the extension, to be ascertained in the manner specially provided for in the deed.

By the expression, "receipts from all sources on the line" of the extension, we understand the receipts to arise from business to be done exclusively within the *termini* of the extension itself, and also that proportion of the receipts of the business of transportation from and to stations on the old road, to and from stations on the new, which, by apportionment thereof between the two, according to the number of miles run upon each in such business, would properly be credited to the new road.

Against these receipts, only, are the expenses of operating the extension to be charged, and it is the surplus of such receipts which constitutes the primary fund for the payment of interest.

What such receipts have been heretofore, cannot be determined without a restatement of the accounts by the company.

By the "gross receipts" referred to, in the fifth article, was intended that proportion of the receipts of the business of transportation, from and to stations on the old road, to and from stations on the new, which, by the apportionment aforesaid, would properly be credited to the old road, and this without any deduction whatever for expenses, and it is to three-fourths of these receipts that the holders of the interest certificates or warrants are, by the terms of the contract, entitled to resort, in case of a deficiency, in the net earnings of the extension, to pay the interest in full.

There is no provision, in express terms, in the contract, for the contingency which has arisen, or is supposed to have arisen, to wit; that of an excess in the expenses of operating the extension, over its "receipts from all sources," whereby no surplus or net earnings, in fact, exist, which can be applied to the payment of the interest warrants, and this gives rise to the question, which is the principal point of controversy, to wit: whether this excess of expenditure is to be first defrayed out of the gross receipts re-

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ferred to, before any application of the latter to the payment of interest, which is the principle hitherto adopted by the company; or whether the gross receipts are to be applied at once, so far as may be necessary to the payment of the interest, leaving the balance of the expenditures of the extension to be provided for out of other funds of the company. This is the principle contended for by the plaintiffs.

The defendants contend, that the parties to the contract contemplated that the business of the extension proper, and that which it should contribute to the old road, would be always adequate to defray the expenses of operating the extension, and leave some surplus, in any event, for the payment of interest, and that the trust deed was framed on this theory, and common expectation, and that hence it provides only for net earnings of the extension, as the primary fund for the payment of interest, and gives a resort to the gross proceeds referred to, only, in case of a deficiency in such net earnings; that these two sources constitute, in truth, but one common fund for the payment of interest, though to be resorted to in succession, and that, by necessary implication, neither are applicable to interest, until the expenses of the extension are paid, and that hence, in the contingency which has happened—that of a deficiency in the receipts of the business of the extension, as above defined, to meet such expenses—it is to be made good out of the gross proceeds referred to, before the payment thereout of any portion of the interest.

The plaintiffs, on the other hand, contend, that the language of the contract is unambiguous, and that there is no escaping from the express provisions of the fifth section, by which the gross receipts referred to are, in terms, appropriated to the payment of any deficiency, in the interest, arising from the insufficiency of the net earnings of extension fully to defray it; and they urge, that, independently of the explicit terms of the contract, there are controlling reasons, some of which will be adverted to hereafter, why the parties must be held to have intended this; and they contend, that in the entire absence of "net earnings," the certificate-holders are in the same position, in respect to their right to resort to the gross receipts, that they would have been in, had there been merely a deficiency in net earnings, as expressed in the contract.

Undoubtedly both parties contemplated "net earnings" of the

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extension, to some extent. Neither of them anticipated an unprofitable or failing business. Neither of them could have contemplated that the business which would be done upon the extension would be inadequate to meet its own expenses, and probably both supposed, that the profits of the business over all its expenses would be adequate, in the general, to pay the entire annual interest of the cost of the extension, and so no express provision was made for a deficiency in receipts to pay expenses.

We think that the trust deed will fairly admit of but one construction. The receipts against which the expenses are to be charged are those only which are specified in the fourth article of the deed, and they are the receipts of the extension "from all sources" as above explained.

There exists no provision, in the deed, charging these expenses against any other fund. If that proves inadequate to meet the expenses, all that can be said is, that it is a contingency not provided against in the deed.

It is no answer, to say that the parties never contemplated such an event; doubtless they never did, but that does not help the defendants. It was a contingency which might happen, and might have been guarded against. Had the parties, as the defendants now contend, intended to provide for the payment of the expenses of operating the extension, before any application of receipts to interest, they would naturally have so expressed themselves. The Court can only look to the language of the contract; and we must, if it be unambiguous, be confined to it, in determining what the parties intended. We find, in it, an express provision for charging the expenses in question against a certain fund, and no provision for charging them against any other, and we find an equally express provision for the payment of interest, out of any surplus of that fund, and out of a certain other fund, without deduction for expenses, if the first fund should prove inadequate.

The first provision was intended for the indemnity of the company, in respect to expenses; the second, for the security of the certificate-holders, in respect to their interest. The Court must look to the rights of both parties. It is entirely clear, that however confident the parties may have been, that net earnings would be realized from the business of the extension, the con-

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tractors for the work were not willing to rely upon that, as the only fund to which to look for their interest; the hazards of the future were, to some extent, taken into consideration.

The extent of net earnings, or the existence of net earnings at all, would depend upon the amount of the expenses of the extension. It could not certainly be known, what these expenses would amount to; it was still more uncertain, what would be the increase of business arising from the extension of the road.

In this uncertainty, as security for the payment of the interest was one of the primary objects of the deed, the provision for the application of the gross proceeds in question, to cover the case of a deficiency in the net earnings of the extension, was the most natural one that could be adopted. It furnished a security which was reasonably reliable. These interest warrants were to be made negotiable, and, to give them negotiable value, it was necessary that the provision for their payment should be such as could be safely depended on; and this was especially important, in view of the fact, that the company was not personally responsible for the payment.

Now, all these objects are secured, by the provision in respect to the gross receipts, if the expression, "gross receipts," is to be understood in its ordinary popular signification, to wit: receipts without deductions for charges or expenses; but if these receipts are, equally with the receipts from the business of the extension, to be charged with the expenses of operating the extension, the whole security for interest is again rendered uncertain and doubtful, since it cannot certainly be said, in respect to the business of any one year, that the expenses, of operating the extension, may not absorb the entire receipts, both of the extension, and of that part of the old road, embraced in this provision, in respect to the gross receipts.

We think the parties intended precisely what they have expressed in this instrument. By "net earnings" and "gross receipts," they intended what those expressions in popular meaning signify, and nothing other or different; the whole spirit of the contract, the objects to be secured and the language of the deed, all import it, and render this construction necessary. Upon this construction, and on no other, can the distinction made between "net earnings" from one source, and "gross receipts" from the

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other, be explained, and why the contract did not, in terms, provide that the two should constitute a common fund, against which the expenses in question should be charged. It was not so done, because such was not the intention of the parties.

But it is said, that the parties have themselves, practically, given a different construction to these stipulations, and have, by their acts, adopted that now contended for by the company.

These acts consist, in the rendering, by the company, to the trustees, or submitting to their inspection, for a period of some three years, before the filing of the complaint in this case, annual accounts of the receipts and expenses of the extension, made upon the principle for which the defendants now contend, and the payment of interest, and the issuing of deferred warrants (or warrants for unpaid interest, as provided for in the sixth article of the deed of trust) to the holders of the certificates, upon the principle adopted in said accounts; and it is now contended, on the part of the defendants, that the Court is bound to adopt the construction thus practically given, to the contract, by the parties themselves.

It is undoubtedly true, that, where the provisions of an instrument are ambiguous, the Court may look to the acts of the parties done under it, "as a clue" to their intention. (*Chapman v. Bluck*, 4 Bing. N. C. 187; *Doe ex den Pearson v. Ries*, 8 Bing. R. 180.)

The principle itself is intelligible enough, but I think it admits of great doubt, whether it can be properly applied to a case like the present—that of a contract strictly executory, covering a period of a long number of years, during each of which accounts are to be rendered of receipts and expenses, and payments to be made semi-annually, and, in respect to which, the only ambiguity which exists, if any, is as to the principle upon which the accounts shall be made up.

In respect to the holders of the certificates, moreover, it may be said, that though they have accepted deferred warrants for a portion of their interest, it by no means follows, that they understood that the accounts were made up on a principle different from that which was sanctioned by the deed of trust. There is no evidence, that they ever saw the accounts; and though it is admitted in the case, that "the accounts, reports and statements set

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forth in the complaint and answer (which undoubtedly did show the principle adopted by the company) were accessible, and open at all times to be inspected by any party interested therein, and that the defendants settled, from time to time, with the certificate-holders, on the basis and terms therein stated," it does not follow, that, in fact, these accounts were ever examined by them, or that they knew upon what exact principle they were made up.

The company, as is admitted in the case, undoubtedly settled with them, "upon the basis and terms" stated in the accounts; but I do not understand that admission to refer to any thing more than the action of the company itself.

It is not a question of notice, but of practical conduct, by parties to a contract, with a view to determine its construction, and, to be of any force for such a purpose, such conduct must appear to have been intelligent, and with a full actual knowledge and understanding of all the circumstances. It is true, the complaint admits the rendering of accounts, from time to time, to the plaintiffs; but the plaintiffs are the trustees, and the certificate-holders, would have a right to assume, without themselves inspecting the accounts, that the trustees had seen to it, that the principle of the accounts was in accordance with the provisions of the trust deed. In fine, there is nothing in the case to show, that the certificate-holders, when they received their deferred warrants, knew that they were not issued in strict conformity with the provisions of the sixth article of the trust deed.

The fact, therefore, of their receiving payment, in money, for a part only of the interest, and deferred warrants for the residue, is not to be regarded by the Court as affecting the construction of the instrument in question, or as indicating an understanding, on the part of the contractors, in respect to its meaning and import, other than, or different from, that which the Court itself has assigned to it.

It is a sufficient answer, however, in our judgment, to this whole objection, to say, that the construction of this instrument is not of so doubtful a character, as to render a resort to this extraneous evidence necessary or proper, in order to explain it.

Then, are the plaintiffs, as respects the accounts already rendered, and the certificate-holders, as respects the interest already paid, and deferred warrants heretofore issued, concluded, by their

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supposed acquiescence in the principle adopted by the company?

It is difficult to say this, unless it can be clearly seen, that the company would be in some way injured, by requiring a resettlement of the past accounts, upon the true principle.

They certainly have not paid more, in any one instance, than they were bound to pay upon the construction of the contract adopted by the Court. They have, in two instances, it is true, paid more, in money, to the certificate-holders, than, upon their own construction of the instrument, they were under obligation to do; but that was not a payment to their own injury, since it was, in fact, less than they were, at the time, bound to pay. They have not pretended, that by reason, or in consequence, and on the faith of the alleged acquiescence, they have conducted their affairs in any other or different way than they otherwise would have done, or have made payments, or incurred obligations which, but for it, they would not have done.

We think, therefore, that neither the trustees, nor the certificate-holders, are to be held to have acquiesced in the principle upon which the past interest accounts have been settled, so as to preclude them from now insisting upon their being re-adjusted, and settled in conformity with the true meaning of the contract.

We are all of opinion, that the company have, in respect to the certificates purchased by them, acquired the rights, and stand in the shoes of the original holders. There was no merger. There is no personal liability for the debt, either principal or interest, on the part of the company, and, consequently, no confusion of rights, as debtor and creditor, in the same person, arising from the purchase. And even if there would otherwise be a merger, yet equity will preserve the rights distinct, where the intention, on the part of the person possessing the rights, to preserve such distinction, is either expressly shown, or is to be implied from the benefit to result from so preserving it. (2 Vesey, Rep. 264.)

The agreement of the 7th day of September, 1850, is, unequivocal on this subject, in respect to one million in amount of these certificates, and, in respect to the residue of the certificates so purchased, the purchase was made under resolutions of the board of directors, one of which, in terms, and the other by fair intent indicate the purpose to hold the certificates so acquired, "with all

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the rights and privileges belonging to them, as fully and unimpaired, as if held by other parties."

The judgment at Special Term should be, in all respects, affirmed.

BOSWORTH, J.—The first question of importance, raised by the appeals of the Harlem Railroad Company, relates to the true construction of the trust conveyance, dated the 31st of October, 1849.

That question is this. Are the gross receipts, mentioned in the fifth article, to be applied directly to pay interest, and interest only, or are they to be applied, in the first instance, to pay such expenses, of operating the extension, as its receipts may be insufficient to pay?

The second article requires the company to so keep their accounts, as to show two results. First, The earnings and receipts of the extension. Second, The receipts of the old road, from the business, from and to stations on the extension, to and from stations on the old road.

For the sake of brevity and clearness, the word "extension" is herein used to denote the portion of the road to be constructed from Dover Plains to Chatham Four Corners; and the phrase "old road," is used to indicate the residue of the road which had been completed, and was in operation before the trust conveyance was executed.

The third article, among other things, prescribes the mode of ascertaining the expenses of running the extension.

The fourth article provides, and declares, that the extension shall be credited "with the whole receipts, from all sources, on the line thereof," and that it shall be charged with "the actual cost of the number of miles run thereon, by freight and passenger cars," and states the mode of ascertaining the amount of such "actual cost." It then provides that the "residue" of receipts remaining, after paying such "actual cost," shall be appropriated "to or toward the payment of the interest warrants on the said certificates, as the same shall become due and payable.

By the fifth article, it is agreed, that if the net earnings of the extension should be inadequate to the payment of the interest warrants, that certain gross receipts, so far as the same might be

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necessary for the payment of interest, should be applied, to an amount not exceeding three-fourths of such gross receipts.

Pausing here, to ascertain the results contemplated by the parties to the trust conveyance, from the terms of its provisions, it would seem to be clear, that all parties expected the receipts from the extension would exceed the actual cost of operating it. Hence, the fourth article provides for applying the surplus of such receipts, over and above the amount of such cost, to the payment of interest warrants, and makes such surplus the primary fund for their payment, and, if sufficient, the only fund for paying them.

An application of gross receipts, from another source, to the payment of interest warrants, is to be made, under the fifth article, in the event that such surplus, or, in other words, the net earnings of the extension, prove inadequate to the payment of the interest warrants, and in that event only.

If all parties did not contemplate, as a possible result, that the cost of running the extension would be greater than the amount of its earnings, then it was not possible, in any event contemplated by the parties, that the gross receipts, mentioned in the fifth article, should or could be applied to any object, except the payment of interest, *eo nomine*. For, if the extension had produced net earnings, it would necessarily follow, that the gross receipts could only be applied to satisfy the portion of the interest warrants not paid by such net earnings. By applying the gross receipts to pay that portion of the interest warrants, they would be applied directly to satisfy interest, and interest only.

In reaching the true construction of the trust conveyance, it is deemed to be of some importance to ascertain, and keep in view, the results anticipated by all parties, as certain, so far as such results are free from reasonable doubt.

What effect, if any, shall be produced on the rights or liabilities of either party, if it shall appear that the actual results are widely different from those contemplated and confidently anticipated by all of them, is a question quite distinct from the meaning of the contract, when construed in the light of the facts existing, and of the views influencing the parties to it, at the time it was made.

It may be quite true, that neither party to the contract would

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have entered into it, as it reads, if his clear conviction of the results, from constructing and operating the road, had been such as the experiment has produced.

But that consideration does not aid us, in arriving at the true construction of the contract.

In the report of the company to its stockholders, made in 1850, it is said that, "By this plan, the business of the road to Dover" (that is the business of the old road) "remained free from liability for expenses or interest upon debt, the dividends upon the preferred stock incurred no new hazard, and were left upon the ample security now provided in the large and increasing business of the line, and the old stock had a new source of probable profit opened to it, free from all sources of danger to the present resources of dividend."

Whatever cotemporaneous exposition of the views and anticipations of the railroad company is examined, so far as they are disclosed by the case, the company had no doubt, and exerted itself to convince others, that the earnings of the extension would be more than sufficient to defray the cost of running it.

Having that view unclouded by a doubt, and anticipating profits instead of apprehending an increased expenditure, and anticipating profits so confidently as to be prepared to give the comfortable assurance to the stockholders conveyed by the report made in 1850, the trust conveyance and its terms and provisions, in respect to the point now under consideration, were so drawn as to make a provision, by the fifth article, for the payment of interest which the provisions of the fourth article might be inadequate to satisfy.

The company was to provide cars and motive power, and operate the extension at all events. But the fourth article clearly indicates the view of the company, that the earnings of the extension would more than pay them the cost of running it. If they did not amount to enough to pay such cost, the difference would necessarily be so much loss to the company.

The only persons having an interest in the insertion in the trust conveyance of a further provision for the payment of interest, were the contractors, who were to construct the extension, and receive payment therefor in the two millions of certificates to be issued by the company.

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Accordingly, the company, having, by the fourth article, provided a fund for the payment of interest, and a fund, too, which could not exist unless the extension should earn more than it would cost to operate it, but still a fund which the company had not the slightest doubt would arise from the extension alone, and would, therefore, pay some part of the interest warrants, agreed, that if such fund should be inadequate to pay interest in full, enough of certain gross receipts to pay interest in full, should be so applied.

Not contemplating the possibility of its costing more to operate the extension than it would earn, it made no provision in its own favor, by the fifth article, based on such a contingency.

Such a provision as was made, was of importance to the contractors, even if the views, which the company sought to impress on its stockholders, should be generally acceded to. It would create a fund for the payment of interest in addition to that provided by the fourth article, and consequently create more confidence in the certificates, and increase the facility for negotiating them on better terms.

The form of the contract, found in the trust conveyance, strengthens this view of its meaning, and of the intent of the parties to it. If it were not true that the net earnings of the extension, and those earnings alone were designed and understood by the parties to be primarily the sole fund for the payment of interest, and if it had not been anticipated so confidently that the extension would earn more than it would cost to operate it, as to make it wholly unnecessary for the company to frame the terms of the contract so as to provide for a contrary result, as a probable one, it is difficult to assign a reason why the contract did not provide that the extension should be credited, under the fourth article, with the gross receipts, and also with the whole receipts from all sources on the line of the extension; and that it should be charged with the cost of operating it, and that the net earnings, thence arising, should be applied to pay the interest warrants.

The surplus, if any remained after paying the interest in full, would belong to the company, to be expended, as it pleased, for any lawful purpose.

But the whole structure of the contract found in the trust con-

vveyance, and of the trust conveyance itself, is based on this idea, which pervades all of its provisions.

The extension, when built, was to be represented by the two millions of certificates. The only mode of coercing payment of the principal of the certificates, is by a sale of the extension itself. Whatever dividend the price, at which it might be sold, would pay upon the certificates, to that extent they would be paid, and as to the proportion left unpaid, the certificates would be valueless.

So it was a prominent feature of this scheme or arrangement, that the extension should produce a fund, out of its earnings, for the payment of interest on the certificates semi-annually.

The contract as drawn, prior to reaching its fifth article, makes clear and full provision for ascertaining the amount of the fund to be thus produced, and for the application of such fund to pay interest. Its income, and the source of such income, is stated. The charges by which it may be affected, are enumerated and defined. The surplus anticipated from it, or the fund thence to arise, after deducting the defined charges, is appropriated, and its application directed.

There is no provision, in any part of the contract, for charging to the extension account any expenses not authorized by the fourth article to be charged to it. Nor is there any provision for crediting it with income from any source other than the earnings of the extension.

But having defined clearly, and so clearly as to be exempt from obscurity, what shall be credited, and what shall be charged to the extension account, and contemplating that it cannot fail to produce a surplus, the fourth article makes that surplus a fund for the payment of interest.

The contractors, for their better security, and to have some resort for the payment of interest, if the fund provided for the purpose should be inadequate to pay it in full, obtained a further agreement, in the fifth article, that if that fund should not be large enough to pay interest in full, that other revenues, not exceeding three-fourths of their amount, to such extent as they may be "necessary for the payment of interest," should be so applied.

I say so applied, because in drawing this fifth article, there was nothing to be provided for, having reference to the preceding articles of the contract, except that part of the interest, which the

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fund created by the fourth article might be insufficient to pay. Nothing was reasonably possible, according to the views of the parties, except that some interest might be left unpaid, after that fund had been applied.

Hence, as I think, a view of the whole contract, as well as the natural and obvious import of the language employed in it, leads to the conclusion, that the application of the gross receipts contemplated, intended and provided for by the fifth article, was an application directly to the payment of interest, and to the payment of interest only.

The provisions of the sixth, eighth and ninth articles, like those of the fifth, are mainly, if not exclusively, for the benefit of the contractors, and those to whom they might transfer the certificates.

It is difficult to find, in any provision subsequent to the fourth article, any clause, apparently designed or adapted to relieve the company from the expenses or consequences of any acts which it had contracted to do by the fourth article, and the articles preceding it.

The sixth article declares what the holders may require, and what the company must do, if the whole fund, provided by the fourth and fifth articles for the payment of interest, shall be insufficient in any one year for that purpose, and how and when such deficiency shall be paid.

By the seventh article, when a year is reached, in which all interest accruing that year, and the deficiency of former years, shall have been paid in full, although a surplus of moneys applicable to that object shall remain, the accounts up to and for such year shall be closed, and such surplus cannot be resorted to, to pay any deficiency of interest subsequently arising.

The eighth article confers the right on the certificate-holders, in case the interest shall at any time be in arrear for two whole years, to have the extension sold and require the company to surrender possession of it to the purchaser.

But by the ninth article the company may be required, by such purchaser, to operate the extension on precisely the same terms that they have covenanted to operate it, for the benefit of the certificate-holders, before such a purchase shall be made.

The eleventh article is as stringent as the eighth and ninth, in

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the event of a sale of the extension after the time fixed for the payment of the principal of the certificate.

By the ninth and eleventh articles, the purchasers of the extension, for whichever of the two causes named a sale may be made, may run the extension as their own property, and on their own account, or compel the company to do it, on the terms mentioned from the second to the sixth articles inclusive.

If it be asked, if the company must be compelled to operate the extension on such terms, and apply its revenues from the old road to pay the cost of operating the extension, and even though they might not be sufficient for that purpose, the answer is, if by the clear meaning of their contract they have agreed to do so, they must perform it, or submit to such consequences as result from breaking a valid contract.

If it be said, that such a consequence may involve them in ruin, the answer is, if any be required, that it was their misfortune to make so unwise a contract, and though bankruptcy should be the consequence, it is a result which happens to individuals under like circumstances, and one which corporations cannot escape any more than natural persons.

If the construction given to this contract is clearly correct, then the company has no ground for claiming, that it has been induced to do acts to their prejudice by reason of the settlements of interest made, which should conclude the trustees and certificate-holders, from claiming the benefit of the contract as now construed.

Upon the construction here given, the company should have paid money, instead of issuing deferred warrants. They had money in hand sufficient to pay interest in full, which it was their duty to have paid, and the right of the certificate-holders to demand.

They have done nothing, therefore, to affect themselves prejudicially, as between themselves and the certificate-holders.

That the stockholders may have received some of the money which should have been paid to the certificate-holders, or that the company may have used it to buy cars, or erect dépôts, or pay the expense of other improvements, is no reason why they should not pay the certificate-holders that which was, at the time

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of all of these settlements, then due, and at none of which they were paid all that was truly due.

If I regarded the true meaning of the contract so ambiguous or doubtful, that the construction claimed by the company was as well supported, by a just and fair view of all the provisions of the contract, as that now claimed by the certificate-holders, I should feel at liberty—if it appeared that the parties to it had, year after year for several years, with a full understanding of all the facts, practically given it one construction, by settling in conformity to it—to hold, that it meant what the parties, by such acts, had demonstrated that they understood it to mean.

Especially would it seem to be reasonable, when the parties, claiming a construction adverse to the one they had given to it in practice, had from time to time, as such settlement occurred, relinquished claims as important as they would have done in this case, and thereby without a cause, unless the practical construction was the true one, have so far depreciated their certificates as to make them unmarketable, when the new construction claimed, if the true one, and according with the real intent and understanding of the parties at the time of the contract, would have made the certificates command a premium in the market.

But I regard the true meaning of this contract to be free from reasonable doubt.

Neither the facts found, nor the evidence given, warrant the conclusion, that any such practical construction has been deliberately and understandingly given, to the contract in question, as the company claims to be the true one, by the original parties to it, or by the certificate-holders, with a full knowledge of the details resulting from operating the extension.

In *Cary v. The Harlem Railroad Company*, the Court states, that "It was not shown that any of these accounts and statements were delivered to the trustees, or shown to the certificate-holders prior to September 26th, 1853." It is not stated when, thereafter, they were shown to either of them.

The Court adds, it was given in evidence, "That on the 25th day of September, 1855, the said defendants, Knapp, Ketchum and Holley, as trustees, were notified that the said accounts and documents were ready for their inspection, and that the plaintiff was so notified on the 26th of said September." That action was

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commenced on the 26th of September, 1855. In the case of *Knapp and others v. The Harlem Railroad Company*, the case, in this respect, is no stronger, on the part of the defendants.

The opening of the extension took place on the first of April, 1852.

The full interest due on the 1st of July, 1852, was paid in cash.

No interest was paid on the 1st of January, 1853, it being claimed, that the whole receipts were absorbed by the expenses.

The company, in their answer, allege, and the Court found, that, "upon the completion of said extension," they purchased of the said certificates, to the amount of \$1,000,000, and subsequently, from time to time, the further amount of \$533,500, all of which they now hold.

If the \$1,000,000 of certificates were bought by the company, immediately upon the completion of the road, that amount was purchased before any such statement as is required by the third article, had been drawn up, and for aught that is stated in the answer, or found by the Court, the same may be true of the additional \$533,500.

It does not appear, that the original contractors held any of the certificates on the 1st of January, 1853, or that there has been any transaction between them and the company since the extension was completed, which would be in any way affected by either construction of the contract.

It is not found directly, nor proved affirmatively by any witness, that any of the certificate-holders, either about the 1st of January, 1853, or subsequently, before these actions were commenced, actually examined any of the semi-annual statements, made by the company, or the trust conveyance.

It cannot, therefore, justly be said, that the certificate-holders ever (and they were not parties to the contract,) actually examined the semi-annual statements, and accepted part payment of the interest in cash, and deferred warrants for the residue, with distinct knowledge, that the company had applied, or construed the contract, as giving them a right to apply the gross receipts to pay the expenses of running the extension.

That they had an opportunity to examine them, and to obtain a copy of the trust conveyance, and compare them with its provisions, so as to determine for themselves, before receiving the de-

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ferred warrants, whether they had a right to demand cash, may be conceded.

But, so long as it does not appear, that any thing of the kind was done, the most that can be claimed is, that they acquiesced in the results, which the company stated to be the true and actual results, without making any such examination of a long and special trust conveyance, to which they were not parties, as would be required by one who was something more than an ordinary man, and possessing a better than a common understanding, to ascertain their rights, however clear they might seem to be, on bestowing the necessary time and labor to comprehend them.

Even if I deemed the true meaning of the contract more doubtful than I now regard it, it would be difficult to hold, that the owners of the certificates have accepted deferred warrants, with such actual knowledge or examination of the contents of the trust conveyance, and with such examination of the semi-annual statements, as would justify the conclusion or position, that they had, by their acts, given a practical construction to the contract.

I think that no such consequence can be given to the settlements of interest, and the facts proved in relation to them, or connected with them, as should preclude the certificate-holders from insisting upon, and having the benefit of the contract, according to its true construction.

Entertaining these views, and remaining of the opinion, that there is no personal liability resting on the company, for the payment of the certificates, and that they are, in equity, entitled to the same rights, in respect to the certificates they have purchased, as any other holder of any of the certificates, I think both judgments should be wholly affirmed.

All the Judges, who heard the case of *Knapp and others v. The Harlem Railroad Company*, having concurred in the conclusion, that the judgment in that case should be affirmed; it follows that the judgment, in the other action, must also be affirmed.

WOODRUFF, J.—When the case of *Cary v. The N. Y. & Harlem Railroad Company, et al.*, was argued, it was understood, that upon all points in controversy, it presented the same questions which had already been discussed at a previous General Term, in the case of *Knapp and others v. The N. Y. & Harlem*

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Railroad Company, before Justices Duer, Bosworth & Slosson, and that both cases should be decided, upon consultation, between all the Judges who heard the arguments in either case.

It would therefore suffice for me to say, in addition to what has been said by Mr. Justice Bosworth, who sat with me in this case, that all of the other Justices concur in affirming the judgments, for reasons stated in one or both of the opinions pronounced by him and by Mr. Justice Slosson respectively, and that therefore the judgment in this case must be affirmed.

I feel nevertheless reluctant to affirm a construction of the contract made by the defendants, the Harlem Railroad Company, to which I think they never have, in fact, intelligently assented, and to which they were never supposed to have assented by those with whom they contracted—a construction, which, in its practical result, devolves upon the company an onerous burden of expenses, which they would not have agreed to bear, and which those with whom they contracted did not expect them to bear.

If it be insisted that an exigency has arisen, that neither party, at the time of the making of the contracts, supposed to be possible, and against which the company have not perhaps sufficiently guarded and protected themselves, it may be answered, with some plausibility at least, that the minds of the parties have not met and concurred in any arrangement which devolves a heavy and unexpected burden, and a certain heavy loss upon the company. And again, if it be conceded that an exigency has arisen which neither of the parties contemplated, is it not a just and safe rule to govern the construction of their contract, in such an exigency, to follow the plain design, intent and spirit of the agreements, if that can be clearly ascertained?

It is true, that if the words of the contract are entirely plain, and are susceptible of only one construction, there is an end of discussion, and we have no inquiry to make after the intention of the parties. In such case, the agreement speaks the intention, and conclusively proves, that the parties meant what they expressed, and that in the intention, so expressed, the minds of the parties did meet and concur.

There is strong evidence in the whole structure of the agreements, and set forth in the deed of trust, embracing the whole arrangement for the construction of what is called “the extension,”

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from Dover Plains to Chatham Four Corners, that the company and the contractors both intended that such extension, if made, should be made without expense or cost to the then stockholders, and without any hazard to them that the income, derivable from the old road, in its then condition, should be reduced thereby.

The inducement to such extension was, however, the hope that the business done thereon, together with the business thereby brought to the old road, would not only pay the cost of such extension and the interest thereon, but yield an additional income for the benefit of the stockholders.

The same evidence makes it probable, that those who contracted to build the extension assumed the risk of obtaining ultimate payment from the proceeds of the business so done, and that the price, or consideration for such building, was fixed in view of that hazard.

It is undoubtedly true, that, if the words of the contract will not admit of an interpretation corresponding with such an understanding in the minds of the parties, the words must control, notwithstanding, any probable supposition, respecting their intent, inferable from the scheme which they would otherwise seem to have had in view.

But that the scheme of all parties was such as is above intimated, is very distinctly indicated by the character of the arrangement, unless the sections of the deed of trust, which are especially relied upon in the opinions of my brethren, plainly express the contrary.

In order to judge whether those sections must necessarily receive such a construction, let it be, for a moment, assumed that the parties intended that the business done upon the extension, together with the business contributed to the old road by such extension, or by reason of its being built, should alone be applied to the repayment of its cost, and to the interest thereon, and that the old road, or those then interested therein, should not be subjected to any loss by reason of the extension proposed.

Assuming that this was the intention of the parties, what stipulations were necessary to secure this result? Obviously, *first*, that the corporation should not be personally or absolutely liable for the cost or the interest thereon.

Second.—That an account should be kept, which should show

what were the actual expenses of maintaining and operating the extension, when finished.

Third.—That an account should be kept which should show the receipts from business done exclusively on the extension.

Fourth.—That an account should be kept of all business which could be properly said to be contributed to the old road, by, or in consequence of the building of the extension—which would embrace the carriage of any goods or passengers which came from any place on the extension, (*i. e.*, above Dover Plains,) or which was destined to any such place, and which business, it might reasonably be presumed, would not come to the old road at all, if the extension was not built.

But as this business, so resulting to the old road, from the building of the extension, could not be done without cost, it would be proper to make some allowance for such cost, and so give to the extension all the profit, as justly owing to such building thereof. And, inasmuch as the old road was in actual operation, and the company was actually then incurring the expenses of running the same, it might fairly be assumed, that the carriage of the last-mentioned goods and passengers would not greatly add to their running expenses; and, therefore, the deduction to be made from the gross receipts, for the cost of this last-named portion of the business, so contributed by the extension, should be small.

Fifth.—The result of the last-named three accounts, to wit: the cost of running the extension, on the one hand, and the receipts for business done on the extension, and the receipts for business so contributed, by the extension, to the old road, on the other hand, would exhibit the whole actual net income, which could arise from the proposed extension of the road, and a fund would be exhibited, which could be appropriated to the cost of the extension, and the interest thereon, without involving the old road, or those interested therein, in any hazard of loss.

And finally, if this fund should not be sufficient to pay the cost of the extension, the holders of the debt, created for its construction, might be allowed to take the extension itself, and run it for their own benefit, or permit the company to run it, accounting for all its earnings, and the profits resulting from its building, according to the plan so provided for.

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It is plain, that such an arrangement would secure the accomplishment of the intention assumed.

Do the provisions of the trust deed, when examined, appear to conform to the scheme here indicated? or, are they inconsistent with it?

I. It was held below, and we are all agreed, that the provisions of the contracts are such, that the corporation is not absolutely liable for the cost of the extension, or the interest thereon. If they faithfully account for, and apply the moneys received by them, which are applicable thereto, they are not liable to make up any deficiency. The first point is, therefore, secured.

II. The first recital in the trust conveyance, declares an intent to provide the manner in which the certificates issued for the cost of the extension, and the interest thereon, shall be paid; that is to say, from the fund thereafter provided—*i. e.*, one fund; and they are to be chargeable thereon.

The condition of the conveyance declares, that it shall cease and be void, if the company shall pay the certificates and interest "out of the proceeds and earnings of said road, as hereinafter provided;" that is to say, out of the fund about to be described, and a fund that is to arise from proceeds and earnings.

III. What, then, is to constitute the fund? and how is it to be ascertained?

By the "second" covenant in the trust deed, the company agree so to conduct and arrange their system of business, as to exhibit clearly:—1st. "The earnings and receipts of that part of the said railroad hereinbefore described," *i. e.*, the extension. 2d. "The receipts of the present road, from the business from and to stations on that part of the road herein described, to and from stations on the present road." For what purpose? "In order that the whole income of and from the road herein described may be ascertained." Here is a definition of the fund upon which the certificates and interest are chargeable, as stated in the recital—and a clear statement of what is meant in the condition, by "out of the proceeds and earnings of said road."

The "whole income of and from the road herein described," is, therefore, to consist not merely of the earnings and receipts of the extension, *i. e.*, from business done upon the rails thereof; but also of the earnings and receipts of the present road, from

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business, from and to stations on the extension, to and from stations on the old road, which, it might be assumed, the company would not have received, if the extension had not been made.

It is then, "third," provided, that the account of the current expenses shall be so kept as to ascertain the cost per mile of operating and maintaining the whole road, and "thereby ascertain the amount chargeable against the income of that part of the road hereinbefore described." It is clear, that if the income here spoken of is the same as is described in the second article, there is an end of the question. By the second clause, "the whole income of and from the road herein described" is to be ascertained. The road herein described is the extension "from Dover Plains to Chatham Four Corners." That income embraces not merely what is derived from business done between the *termini* of the extension, but also the business which, originating or terminating on the extension, is due to its construction and properly belongs to it as income. And when the whole income is so ascertained, then, by the third article, the expenses of maintaining and operating the extension are declared to be chargeable to that income. If, by these clauses, the company have defined the whole fund, out of which the interest on the certificates is to be paid, and have made the expenses chargeable thereto in the first instance, they have accomplished the object in view. They have given up, to the payment of the interest, all the income derivable, actually or constructively, from such extension. And in accordance with this view of the meaning of these clauses, the company have heretofore, for many years continuously, after the extension was completed, kept their accounts and paid over the balance thereof without objection or question.

But it is supposed, that the fourth and fifth covenants in the trust conveyance are inconsistent with an intent to charge the whole expenses of operating and maintaining the extension to the whole income derived in the manner above stated.

It is not difficult to reconcile any seeming discrepancy. If the above view of the meaning of the previous provisions be correct, the company had made the whole income of the extension liable to the payment of the interest on the certificates, as security to the holders thereof, and had made the expenses of the extension chargeable against such income, so that the certificate-holders

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were assured that they should, to the extent of such interest, have the whole of such income, and the stockholders in the old road would see that what was so appropriated to the cost of the extension was not in diminution of the income already derivable from the old road.

But in assenting to this arrangement the company had secured to themselves a further advantage. It was foreseen, that it might happen that the "whole fund" so provided might not be sufficient in some years to pay the interest, and in other years there might be a surplus; and by the "seventh" provision it was provided, that when, in any year, that year's interest should be paid in full, the account of that year should be closed—the surplus, if any, should not be liable for the deficiency of any future year, but might be disposed of as the company saw fit.

And again, it was undoubtedly anticipated that the receipts on the line of the extension would, alone, be sufficient for the payment of the interest.

There is, therefore, at least, great plausibility in the argument that the fourth and fifth covenants were not intended to change in any manner the application, of any portion of the fund created, from the payment in the first instance to the payment of the expenses of the extension, but only to define how and in what order, in stating the account of the fund, the two branches or portions thereof, already above defined, should be brought into it.

First, (by the "fourth" article,) they should credit to the fund the whole receipts, from all sources on the line thereof, *i. e.*, between its *termini*, and charge the expenses to be ascertained as above stated. It was doubtless expected, that the balance would pay the interest, and it was to be applied to that purpose. If it should prove sufficient, there would be no occasion to resort to any business done on the old road, although contributed thereto by, or by means of building, the extension. But if it should prove insufficient, then, second, (by the fifth article,) they should apply the second branch of the fund, already defined as forming a part of the whole income of the extension, *viz.* : three-fourths of the gross receipts from business done over the present road, from and to stations thereon, to and from stations on the extension. (Thus reserving one-quarter, to indemnify the old stockholders for the absolute expenses of doing this last branch of

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business over the old road.) What is meant by "apply" as here used? It is said, with great force, it means apply directly to the deficiency of interest. But, looking back to the second article above referred to, where this identical branch of their revenue is agreed to be stated, in order that the "whole income" may be ascertained; to the words of condition in the conveyance; and the recital where the certificates are made chargeable upon the whole fund herein provided; and again, to the third article, where the expenses are said to be chargeable against the "income," it is not necessary so to construe these words: it much more nearly accords with the apparent design of the parties to say, that it means apply to the fund, *i. e.*, apply to the account stated in the fourth article, thus making the whole income of the extension derived from the two sources applicable, first, to the expenses, and then to the payment of the interest on the certificates.

And this is in harmony with another apparent purpose, applicable to this particular part of the receipts: it was not to enter into the account, any further than might be necessary for the payment of interest; and it is not clear, that it could be claimed at all, for the creation of a surplus.

And once again, that it was to be applied to the fund, as one fund, applicable, first to expenses, and then to interest, is indicated by the fund being always spoken of as single and entire. It is when the "whole fund," embracing both classes of receipts, and so made up, is deficient, that, by the sixth article, deferred warrants are to be issued. The application, then, mentioned, in the fifth article, is an application to the account, and made by crediting in the account of the fund, in which are already credited the other class of receipts, (as mentioned in the fourth article,) so much of the receipts of the old road, from the business described, as is necessary to make the balance of that account adequate to the payment of the interest.

The practical result of this view of the contract, is to appropriate to the payment of interest the actual net receipts arising from the building of the extension, and its contribution of business to the old road, and no more. And that this, and nothing more than this, was the precise understanding of the parties, and the declared interpretation, of these clauses of the trust deed, appears, in very terms, in the eleventh article of the covenant, where

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it is provided, that if the certificates be not paid, the holders may, themselves, require a sale of the extension, or may require the company to operate and maintain the extension, upon the same conditions and provisions for the "application of the net receipts therein arising," for a further term of twenty years. It was net receipts, *i. e.*, the balance of the receipts, over and above the expenses, which, the whole scope of the arrangement contemplated, should be secured to the certificate-holders, for the payment of interest.

And this they have received by the manner the receipts have heretofore been accounted for.

Cotemporaneous exposition, of the meaning of the contract, was given by the parties in conformity with these views.

The construction of the contract now claimed, involves the company not only in the loss of the expenses of operating the extension while the certificates are running to maturity, but, as the case may be, during the continuance of the charter of the company, notwithstanding the certificate-holders may cause the extension to be sold, and the company lose all title thereto, since they may still be required to maintain and operate the same for the benefit of the purchasers.

These seem to me strong reasons for rejecting the construction of the contract for which the plaintiff contends, and for believing, that neither the defendants, nor the parties with whom they contracted, ever contemplated any such construction, or agreed to any contract understood to bear such an interpretation.

The conclusions of my brethren, however, on this subject, are controlling; and if I were to confine my attention, solely, to the reading of the fourth and fifth articles, I should be constrained to say, their views were most in accordance with their literal interpretation.

Judgments affirmed with costs.

ADRIAN H. MULLER, Plaintiff and Respondent v. JOHN T. B. MAXWELL, Defendant and Appellant.

1. When the written terms of a sale of a lease of real estate for a period of fifteen years are, that "the lessee will pay the auctioneer his fee of \$10, for each year, being \$150, in cash, this day," and the person purchasing, at the time of such purchase, signs a paper-writing, (at the foot of such written terms,) which states, that he has leased such real estate for the sum of \$8150 per annum, and "agrees to comply with the terms above set forth;" the auctioneer, (a lease of the premises having been made to, and accepted by such purchaser,) may maintain an action in his own name, against the purchaser, to recover such fees.
2. The purchaser, in such a case, by force of the terms of sale, and of his agreement to comply therewith, promises to pay the auctioneer's fees directly to the auctioneer. The grant of the lease to the purchaser, and his acceptance of it, are a sufficient consideration for the promise. The auctioneer is the actual party in interest, as promisee, and alone entitled to receive the fees, and may sue, in his own name, to recover them.

(Before BOSWORTH, HOFFMAN, SLOSSON, and WOODBURY, J. J.)
Heard, Dec. 12; decided, 19, 1857.

THIS is an appeal by the defendant, Maxwell, from an order made at Special Term, November 10, 1856, overruling his demurrer to the plaintiff's complaint.

The complaint states, that "the plaintiff heretofore, and on or about the 26th day of February, 1856, was employed as auctioneer, by Messrs. Thompson, the owners of the premises hereinafter mentioned, or persons entitled to make the lease hereafter mentioned, to offer, at public auction, in the Merchants' Exchange, in the City of New York, a certain lease or right to have a lease of the premises No. 38 Wall street, in the City of New York, under the terms of sale and written conditions, a true copy of which is hereto annexed, marked A; that, at the time and place aforesaid, the plaintiff, as such auctioneer, offered said lease and right to take a lease at public auction, under the aforesaid terms and conditions, which were then and there read and announced as the terms and conditions upon which said lease was offered, and the defendant then and there bid and agreed to pay the yearly rent of eighty-one hundred and fifty dollars for said lease, under said terms and conditions; and the rights offered, and the benefits

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mentioned in said terms and conditions were thereupon struck down to the defendant, who thereupon subscribed a memorandum annexed to said terms and conditions, a true copy of which is hereto annexed, marked B; and the defendant, in consideration of the premises and the agreement of the aforesaid employer of the plaintiff, to execute and deliver the lease mentioned in said memorandum, then and there made with him, agreed, at the same time, to take such lease, and fulfil the said terms and conditions mentioned in said memorandum, on his part, and further agreed with the plaintiff's said employer, and also with the plaintiff, to pay to the plaintiff the sum of one hundred and fifty dollars, for his services in the matters aforesaid, in cash, on the day of sale; that the plaintiff, and also his said employer, has fulfilled all the conditions precedent of said agreement, on his part, and the lease mentioned in said memorandum has been given to the defendant, or his assignee, or nominee, prior to the commencement of this action; but that the defendant has not paid the sum of one hundred and fifty dollars, so agreed by him to be paid to the plaintiff, in and by said terms and conditions, and his subjoined memorandum, though the same has been demanded from him, but the same remains wholly due and unpaid.

"Wherefore the plaintiff demands judgment against the defendant in this action, for said sum of one hundred and fifty dollars, and interest thereon, from the 26th day of February, A. D., 1856."

A.

"Terms of Sale of Lease, 38 Wall Street

"The lots, with the buildings thereon, No. 38 Wall street, will be leased for fifteen years, from 1st day of May, 1856, at so much per annum, payable quarterly on the usual quarter-days.

"The lessee will be required to covenant to pay all taxes and assessments, including the Croton water tax, from the 1st day of May, 1856, during the whole term of said lease.

"The lessee is to have the privilege of making any alterations in the building, which shall be left on the premises at the expiration of said lease. Satisfactory security is to be given by the lessee, if required by the lessor, for the faithful fulfilment and performance of all the covenants of the lease. The parties taking the lease

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must be prepared to execute the papers on or before the 4th of March next, at the office of Anson Livingston, No. 52 John street, who will give all necessary information as to title.

"The lessee will pay the auctioneer his fee of \$10 for each year, being \$150, in cash, this day.

"*Dated New York, Feb. 26, 1856.*

B.

"I have leased the premises, No. 38 Wall street, for the sum of \$8150 per annum, and agree to comply with the terms above set forth.

JOHN T. B. MAXWELL."

"*New York, Feb. 26, 1856.*"

The defendant demurred to the complaint, on the ground that it "does not state facts enough to constitute a cause of action." The demurrer specified, as reasons for the insufficiency of the complaint, the several propositions contained in the points made by the appellant, on the argument of the appeal.

On the argument of the demurrer, at Special Term, an order was made "that the plaintiff have judgment on the said demurrer, unless the defendant answers within twenty days after service of a copy of this order, and pays to this plaintiff \$22, costs of the said demurrer."

From that order, the present appeal is taken.

R. E. Mouni, Jr., for defendant, the appellant.

I. The written instrument, upon which this action is brought, is void, because—1. It is not subscribed by the parties by whom the lease was to have been executed; nor do their names appear therein. (2 R. S. 135, § 8, orig. edit.) 2. It expresses no consideration. 3. It is not mutual: the defendant could have no claim or right of action against the plaintiff. (*Champlin v. Parish*, 11 Paige R. 405; *Mo Whorter v. McMahon*, 10 Paige R. 386; *Townsend v. Hubbard*, 4 Hill R. 351.)

II. The contract is entire, and not divisible; and if void in part, it is void altogether. (*King v. Brown*, 2 Hill R. 485; *Thayer v. Rock*, 13 Wend. R. 53.)

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III. The agreement, if any, was made with the owners of the premises, and this action should have been in their name.

IV. If the instrument be divisible, and allowing one action thereon for the benefit of the lessors, and another by the plaintiff, for his fees, even then, the fulfilment, by the defendant, of one part, does not take the case out of the statute.

V. The instrument was not made valid by the subsequent fulfilment of any part of it. It had no reference to any future consideration, and if void at the time of its execution, it was void for all times: *a fortiori*, if the alleged undertaking with the plaintiff is to be considered as independent.

VI. The payment of the plaintiff's fees is not one of the "terms of the lease," expressed in the instrument.

VII. The services of the plaintiff were a past consideration when the defendant signed the instrument, and arose out of his engagement with his principal. The undertaking of the defendant, therefore, is to answer for the debt of another, and should express the consideration. (2 R. S. 185.)

Weeks and De Forest, for respondent.

I. Upon the facts stated in the complaint, independently of the averment of an express promise, the defendant became liable to pay the plaintiff as soon as the lease was struck down to him.

II. The complaint, in addition, sets forth an independent agreement, for sufficient consideration, made directly between the defendant and plaintiff, to pay the latter.

III. The promise set forth is, to pay the plaintiff for his services as auctioneer, etc.; and, being for the benefit of the plaintiff, he is the proper party to sue upon it. (*Schemerhorn v. Vanderheyden*, 1 Johns. Reports, 138; *Ellwood v. Monk*, 5 Wend. 235; *Brewer v. Dyer*, 7 Cushing, 338.)

IV. Taking the entire complaint together, it appears that, before making the lease, it was well understood between the parties, that the person who received it was to pay the plaintiff his stipulated fees. The defendant, having accepted the lease upon this understanding, is bound to pay the \$150, as part of the consideration-money.

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BY THE COURT. SLOSSON, J.—Whether the memorandum, annexed to, and forming part of the complaint, was a sufficient memorandum, within the statute of frauds, to bind the owner of the premises to make the lease, in pursuance of the sale at auction, it being signed neither by the owner nor by a duly authorized agent, is not a question which can be raised on this demurrer; since the owner has actually executed the lease to the defendant, upon the terms upon which the premises were bid off by him.

Had the memorandum been actually signed by the owner, or by the plaintiff, as his lawfully authorized agent, it would, though not signed by the defendant, have bound the latter, and have created, in respect to the auctioneer's fees, a privity of contract between him and the plaintiff, which would have entitled the latter to sue for the fees, in his own name. (*Bleecker v. Franklin*, 2 E. D. Smith, R. 93.)

But the memorandum is actually signed by the defendant, and, by it, he expressly agrees to pay the auctioneer the fees for which he now sues. Whether this be treated as a stipulation with the owner, to pay the auctioneer, or with the auctioneer himself, in either case, the latter may sue for them in his own name.

The argument, that the owner of the premises was not bound by the memorandum, and therefore, the defendant is not bound, is answered by the fact, before adverted to, that the owner has complied with the terms of it, and executed the lease.

The defendant cannot now object to its sufficiency, both parties having acted under it, and the defendant having received the benefit of it.

Besides, the complaint alleges a distinct agreement, by the defendant, with the plaintiff, to pay the fees in question, for his services as auctioneer, and that the services were rendered.

This the demurrer admits. Such a promise, would not be a promise to pay the debt of another, but an original undertaking of the defendant himself, and would be good, though not in writing.

In every aspect, the demurrer is not well taken.

The order must be affirmed.

Affirmed accordingly.

Ross v. West.

JAMES ROSS and WILLIAM NEWELL, Plaintiffs and Respondents,
v. GEORGE E. WEST, Defendant and Appellant.

1. If one partner, upon a dissolution of his firm, assigns, to his co-partners, all his interest in all the property and assets of the firm, and covenants not to interfere with the collection of the debts owing to the firm, and subsequently, for a valuable consideration received by himself, settles and receipts, as paid to him, one of the debts so assigned, an action will lie against him, at the suit of his co-partners, to recover the amount of such debt.
2. It is no answer to such action, that the original debtors might, notwithstanding such settlement, be sued by his co-partners to recover such debt, on the ground, that no money was paid or property delivered on such settlement, but that the defendant received the debt, as paid to him, on receiving from such debtors a receipt that he had paid to them, in full, a debt of an equal amount which he, individually, owed to them.
3. The Court, at General Term, on an appeal from a judgment rendered at Special Term, or entered on the report of a referee, cannot look into the question, whether a previous order, requiring the defendant to be arrested and held to bail in the action, was properly granted.

(Before DUER, CH. J. and HOFFMAN and PIERREPONT, J. J.)

Heard, Jan. 6; decided, Jan. 30, 1858.

THE complaint alleges, that on or before the 20th of October, 1854, the plaintiff Newell and the defendant were partners in business, and as such, had divers assets; and that on that day, the defendant, for value received, sold and assigned to the plaintiffs, jointly, "all his interest in each and every of said assets, and in all the partnership property; and among said assets, so sold and conveyed, was an account and demand against the firm of Bloodgood & Bouse, for the sum of \$287.97, due and owing said co-partnership; and after said conveyance, and on or about the 5th of December, 1854, the defendant received and collected, from said Bloodgood & Bouse, the said sum of \$237.97 in full of said account, and receipted for and discharged the same without the authority of the plaintiffs; and though often requested, has not paid the said moneys so collected, nor any part thereof, but is still indebted therefor," and prays judgment for \$237.97, with interest from December 5, 1854.

The answer admits the transfer by West, to the plaintiffs, of his interest in the partnership, and alleges it was a limited partner-

ship; that Ross was the special partner, and that it continued until the 1st of January, 1855. It puts at issue the allegations as to Bloodgood & Bouse being debtors of the firm, and as to the settlement of their alleged debt. It sets up matters by way of counter-claim, and prays judgment against the plaintiffs for \$12,300, with interest from the 20th of October, 1854.

The action, being at issue, was referred to a referee, to be tried and decided by him. On the trial, among other evidence, there was produced a written and sealed agreement, dated October 20th, 1854, signed by all the parties to this action, which recited, that the three were partners, that the plaintiffs had purchased West's interest, and by which said agreement, he sold and assigned to them all his interest in the property and assets of the firm, and covenanted that he would "not use the partnership name or credit in liquidation, or for any other purpose whatever." The referee's report, exclusive of its recitals, reads thus, viz:—

"I find, that all the facts stated in the complaint in this action are true, as therein stated; that the manner in which the defendant received and collected from the firm of Bloodgood & Bouse, the sum mentioned in said complaint, was by receiving from the firm of Clement & Bloodgood, who were in the habit of paying the bills of Bloodgood & Bouse, a receipt and discharge of a similar amount of indebtedness, due from the defendant to said Clement & Bloodgood, and thereupon giving a receipt for said sum due, from Bloodgood & Bouse, to the firm of West & Newell, and signing the name of West & Newell to such receipt."

"I further report, that the counsel for the defendant, with the assent of the counsel for the plaintiffs, voluntarily withdraws the counter-claim set up in the answer, without prejudice to his right to avail himself of the same in another action."

"I find, as matter of law, from the foregoing facts, that the plaintiffs are entitled to recover, from the defendant in this action, the amount claimed in the said complaint, with interest from the 5th day of December, 1854, amounting to \$36.78, and making, in the aggregate, for principal and interest, the sum of \$274.75."

"I do, therefore, decide, adjudge and report, that the plaintiffs in this action, are entitled to recover, from the defendant, the said sum of \$274.75, together with the costs of this action."

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"All of which is respectfully submitted.

"Dated New York, February 20th, 1857."

When the plaintiffs rested their case, the defendant's counsel moved that the complaint be dismissed, and a report made in favor of the defendant, on the grounds—

1st. That there was no conversion of money or property of the plaintiffs proved.

2d. That the complaint sets forth that the defendant received and collected from Bloodgood & Bouse the money: whereas the evidence of the plaintiffs is, that the amount of the receipt given by West was credited by the witness, Clement, upon the claim which Clement & Bloodgood held against West; and that there is a failure of proof on the part of the plaintiffs.

3d. That the defendant received no money or other valuable consideration of Bloodgood & Bouse, or of Clement & Bloodgood; the original indebtedness remains intact, and the giving and crediting of the receipt, made by West, upon an individual debt, is not a new consideration.

4th. Such act cannot be construed into a tortious, or fiduciary transaction.

The referee denied the motion, and the defendant's counsel excepted.

Judgment having been entered on the report, the defendant appealed from the judgment, to the General Term.

Geo. Sher, for defendant, the appellant, made and argued the following points:—

I. The complaint states that the defendant "received and collected," of Bloodgood & Bouse, money. The evidence is, that the amount named in the receipt given by the defendant was, in form, passed by the witness to the credit of West, upon the claim which Clement & Bloodgood held against the defendant individually. There is a failure here of proof. (Code, § 171.)

II. The evidence does not prove the conversion of any tangible property of the plaintiffs, or any injury done to the plaintiffs's interests. 1. West, as partner, or assumed agent, was possessed of no power to create or discharge a partnership liability or claim, when it was for the manifest purpose of being credited

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therefor upon a past individual indebtedness. 2. Clement & Bloodgood parted with nothing for the receipt. (*Stewart v. Small*, 2 Barbour's S. C. R. 566.)

III. This action cannot be said to be brought upon the theory that the plaintiffs have waived the alleged tort and fraud, and rest their claim on the assumption that West was authorized to do the act stated, as their agent. They expressly disclaim any such waiver, the complaint stating that the defendant acted "without the authority of the plaintiffs." There is no ratification or adoption of his act.

IV. This action can only be maintained by predicating it upon the idea that the agent has, by such act, discharged the plaintiffs' claim against Bloodgood & Bouse. The plaintiffs properly place their right of action on such idea. (*Beardsley v. Root*, 11 John. R. 465.) 1. The plaintiffs' right to recover of Bloodgood & Bouse remains intact. They have not lost or gained any thing by the nugatory act of West. (*Underwood v. Nicholls*, 33 Law and Equity R. 321; *Dob, et al., v. Halsey*, 16 Johns. R. 34; *Gram v. Cadwell*, 5 Cowen R. 489.) It is a good defence, that the misconduct of the agent has been followed by no loss or damage to the principal; for the rule then applies, that although it is a wrong, yet it is without damage, and to maintain an action, both must concur. (Story on Agency, § 236.)

V. The defendant is not estopped from availing himself of the real nature of the alleged act, as proved by the plaintiffs. 1. The plaintiffs have not been induced, on the faith thereof, to alter their condition in relation to Bloodgood & Bouse; they have not acted upon it. (1 Greenleaf's Ev. § 209.)

VI. If there has been any interference with the rights of the plaintiffs herein, such act, as proved, cannot be construed into a tortious or fiduciary transaction. The action should have been brought upon the covenants in the bill of sale. (*Masters v. Stratton*, 7 Hill, 101.)

C. A. Nichols, for respondents.

BY THE COURT. HOFFMAN, J.—The defendant having sold, (for its full value as we must assume,) his whole interest in the assets of the firm of which he was a member, and having cove-

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nanted not to use the partnership name, in liquidation or otherwise, gives a receipt to debtors to the firm for the amount of the demand; and gives it in the partnership name.

That receipt is so expressed as to justify the plaintiffs in supposing that the money was actually paid by the debtors, so as fully to exonerate them, and as the firm had not then expired according to its original limitation, and no proof was given of the debtors' knowledge of its actual dissolution, the plaintiffs could not but conclude that the debtors were fully discharged. They, therefore, brought their action against the defendant to compel payment of the amount thus received by him.

It turns out, upon the trial, that the defendant owed these debtors, on his own individual account, a sum of money exceeding their indebtedness to the firm, and he was credited by them with the amount of the latter debt on that individual account. It may be noticed, that although the personal debt was to Clement & Bloodgood, it is treated by both parties as the same as if it had been to Bloodgood & Bouse.

No money passed at the settlement; nothing but receipts. The claim was for groceries furnished to West's family.

It may be that Bloodgood & Bouse, being parties to the transaction of thus attempting to liquidate their debt to the firm, were not effectually discharged. But this was a matter for the action of the plaintiffs, who were clearly at liberty to repudiate the receipt, or to ratify it. They do ratify it, when, with knowledge of the facts, they proceed with this action against the defendant, and demand a judgment for the amount, as an amount in his hands received from their debtors. To permit the defendant to set up as a defence, that although he obtained full value from the debtors for the receipt he gave, they remain liable, and he is not, would be to enable him to commit a fraud against one or the other party, and to sanction it.

We cannot hesitate in affirming the decision of the referee.

It has been suggested, that the defendant is now under an order of arrest obtained at the commencement of the action. It is insisted, that if the ground on which the action is sustained, is merely his violation of his covenant, and reception of money, or its equivalent, to the plaintiffs' use, an arrest could not be supported. And also that an execution against the person could

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issue, as of course, upon the basis of the order of arrest remaining in force after the return of one against the property. (*Corwin v. Freeland*, 2 Selden, 560. Code, § 288.)

We apprehend that the General Term cannot make an order in the matter. If any redress can be had, either before or upon the execution which may be issued, it must be sought elsewhere.*

Judgment affirmed with costs.

PHOEBE C. BROWER, by her next friend, Plaintiff *v.* JOHN ORSER, Sheriff, etc., Defendant.

1. It is irregular to take a verdict subject to the opinion of the Court at General Term, when there are facts to be settled upon contradictory or doubtful testimony.
2. The General Term has no right, of itself, to deduce facts from evidence, in order to found a judgment.
3. The amendment, in 1857, of the 333d section of the code, has not varied this rule, or established another, in relation to proceedings that may be had at the trial, or in relation to the powers and duties of the Court at General Term.

(Before HOFFMAN and PIERREPONT, J. J.)

Heard, Jan. 18th; decided, Jan. 30th, 1858.

THIS case comes before the Court, on a verdict taken for the plaintiff, valuing the property in question at the sum of \$200, subject to the opinion of the Court at General Term, with liberty to the Court to enter judgment of dismissal, and with liberty to either party to turn the case into a bill of exceptions.

The cause was tried in May, 1854, before the late Chief Justice Oakley, and a jury. Certain exceptions were taken by the de-

* The papers on which the appeal was heard, do not disclose the grounds on which the order of arrest was made, nor that any such order had been granted. An order of arrest may be granted for causes having no connection with the nature of the plaintiff's cause of action, or the grounds on which his right to recover is placed. (Code, § 179, sub. 5.) An order of arrest can be vacated, by a motion under § 204, and by an appeal, from the order denying such motion, taken under § 849 of the Code, and, probably, by no other mode of proceeding.—Rep.

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fendant to his rulings, in rejecting testimony, which were not pressed on the argument, and which the Court, at General Term, thought were clearly untenable.

The facts are these: The plaintiff intermarried with one Abraham Brower, in the month of August, 1848. On the 24th of March, 1849, her husband went to California, where he resided until 1851, when he returned to New York, and has lived with his wife, the plaintiff, ever since.

The plaintiff had, for many years prior to her marriage, kept a boarding-house, in Green street, and elsewhere. In May, 1849, she moved to Mulberry street, and took a lease of the premises, in her own name, for two years. Her husband was then absent.

In August, 1849, one Thompson sold a piano to the plaintiff, for the sum of \$240. The purchase-money was adjusted, by crediting him with a board-bill he had incurred with the plaintiff, of about \$60, and an agreement, that he should board out the balance, which he did. The \$60 had, no doubt, accrued for board after the marriage.

The piano was used in Mulberry street, for the period that the plaintiff remained there, and was carried with her where she removed.

About the 18th day of October, 1853, the Sheriff of the County of New York, the present defendant, received an execution upon a judgment obtained, in favor of L. & J. R. Ingersoll, against Abraham Brower, the plaintiff's husband; and, under such execution, he levied upon the piano. The judgment was upon a debt contracted before the marriage.

The testimony of John R. Ingersoll was taken, as to certain admissions of Mrs. Brower, the plaintiff, of having received money from her husband, in California, to pay for a piano, which is particularly stated in the opinion.

J. M. Van Cott, for plaintiff.

A. J. Vanderpoel, for defendant.

BY THE COURT. HOFFMAN, J.—A similar question to that which arises in the present case, has been before the Court, in the

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late cases of *Freeman v. Orser*, (5 Duer, 476,) and *Burger v. White*, (November Term, 1857, Ante p. 92.) Under what circumstances, property, resulting from the earnings and labor of a wife, can be exempt from seizure by the husband's creditors, is the point there and here raised. Whether the present case would be governed by the one or the other of those decisions—whether it would fall within the general principle of the former, or the exception established in the latter, would require a careful analysis of both, and comparison of the facts. We are not called upon to determine this question, for there is one point which compels us to send the case back for a new trial.

The verdict was taken by consent, subject to the opinion of the Court, with liberty to dismiss the complaint. This course is permitted by the Code, when, upon a trial, the case presents only questions of law. In that case, judgment may be given at the General Term. (§ 265.)

All this presupposes settled, or undisputed facts. It is contrary to the theory of a trial by jury, and unwarranted by the Code, to take a verdict, subject to the opinion of the Court, when facts are to be deduced from disputable or uncertain evidence.*

We do not understand, that the amendment made in 1857, to the 333d section of the Code, varies this rule. It directs a concise statement of the facts, upon which the questions or conclusions of law arose, to be prepared by the Court, (of course, at General Term,) and be filed with the judgment roll. But those facts must, we presume, have come before the General Term, ascertained and settled, or admitted in the usual manner, or be established by evidence to which there is no contradiction, and the force and effect of which is not doubtful. This statement is made "for the purposes of a review in the Court of Appeals," and for such purposes only. (Laws of 1857, chap. 723, § 11, as amended, sub. 2, and § 333, as amended.) It is not a statement of facts found by the Court upon doubtful or conflicting evidence, but a summary of the facts, in relation to which there is no doubt or dispute, out of which facts the questions of law arise, which the Court is called on to determine, and which alone they decide.

Now, Ingwersoll swore positively to admissions of the plaintiff,

* *Cobb v. Cornish*, (16 N. Y. R. 602.) *Gilbert v. Beach*, (Id. 606.)

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that she had received money (\$250) from her husband in California, and that the piano seized, belonged to her husband. He also stated, that she said she had paid for the piano with money received from him.

Now this would not be true, in fact, as the purchase was made in August, 1849, and the husband did not get to California until September. The witness fixes the conversation with the plaintiff to have been in 1850.

Yet it by no means follows, that she may not have said all that is deposited to, and still less, that the main fact, of a remittance to purchase a piano, may not have been admitted, and loosely spoken of, as having been applied to pay for it.

This matter should have been submitted to the jury.

New trial ordered, costs to abide the event.

JAMES E. WOOD and SAMUEL R. MABBATT, Plaintiffs and Respondents, *v.* WILLIAM H. MERRITT and BENJAMIN J. II. TRASK, JR., Defendants and Appellants.

1. It is not an absolute unqualified rule, that a joint owner of a vessel may not sustain an action against the other owners, for contribution to a demand paid by him, during the continuance of the relation. If it appears, that at a certain period, such as the time of a report of a referee, no accounts are outstanding, which might change the apparent liability of a party, or wholly displace it, the fact of the joint ownership continuing, will not defeat a suit to recover a proportion of a sum paid to a creditor under a judgment recovered.
2. Each owner is responsible only to an amount proportionate to his interest in the vessel.
3. In an action to recover that aliquot part, the defendant may have allowed to him, by way of counter-claim, the plaintiff's aliquot part of a liquidated demand owing by the owners of the vessel, as such, to the defendant.

(Before HOFFMAN and PIZZERONI, J. J.)

Heard, January 12; decided, January 30, 1858.)

THIS action comes before the Court, at General Term, on appeal by the defendants from a judgment entered against them on the report of a referee.

The plaintiffs, James E. Wood and Samuel R. Mabbatt, as part

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owners of the propeller M. K. Wilson, (they owning $\frac{1}{2}$,) bring this action against William H. Merritt and Benjamin J. H. Trask, Jr., as other part owners thereof, (the latter owning $\frac{1}{2}$,) to recover of the defendants one-half of the amount paid by the plaintiffs, to satisfy a judgment recovered by Hogg & Delamater against the present plaintiffs and defendants, as owners of such propeller. Who the other part owners are, is not proved, nor does it appear, that any objection was taken, in the suit brought by Hogg & Delamater, that the other part owners were not made defendants therein. In the present action, the defendants' answer, among other things, contains the following allegations, viz:—

"That also, when the plaintiffs were owners with the defendants in the same proportions, at various times, Michael K. Wilson, George Dobson, George Wilson, Henry C. Worth, Richard N. Hayden, William Amden and Hiram Watson were, and each of them was owner in the said steamboat, and while so, the defendants paid and advanced money, and furnished supplies, for which they have not been paid, and which should also enter into the account; and said Michael K. Wilson, George Dobson, George Wilson, Richard N. Hayden, Henry C. Worth, Hiram Watson and William Amden are, and each of them is, a necessary and proper party defendant herein, and that the plaintiffs' complaint, in not joining said persons as party defendants, is defective, and defendant prays the full benefit thereof."

PLAINTIFF'S REPLY.

"The plaintiffs, replying to the answer of the defendant, Trask, say, that they deny, on information and belief, that the defendants supplied said steamboat, or paid out moneys for the said steamboat; and they deny, that on an accounting for all the debts and expenses of said steamboat, it will be found, that all the defendants will be found to pay of the debt in question, is one-quarter of whatever is actually due, less what the boat owed them, as is stated in said answer.

"And the plaintiffs deny, on information and belief, that the defendants advanced moneys, or furnished supplies, for which they have not been paid, or that the boat was indebted to the said defendants."

The case made, on which the appeal was heard, contains no
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part of the testimony given on the trial before the referee, to whom the action was referred. His report is in these words, viz:

"REFEREE'S REPORT OF THE FACTS FOUND, AND OF HIS CONCLUSIONS OF LAW."

"The parties to this action, were part owners of the propeller M. K. Wilson, plaintiffs owning $\frac{1}{2}$, and defendants $\frac{1}{2}$, and no more. While they were such owners, Hogg & Delamater made repairs on the vessel to a considerable amount, and afterwards commenced an action, against the plaintiffs and defendants, to recover for the repairs so made. Judgment was recovered, in this action, against all the defendants, for \$704.46, April 22d, 1854. The execution was collected from the now plaintiffs, on May 29th, 1854, who paid to the deputy-sheriff \$709.58, for the amount of the judgment, and \$8.79, poundage and expenses, in all, \$718.37. For the proportion of amount, which the now plaintiffs may justly claim from their former co-defendants, this action is brought.

"The defendants, during the years 1852 and 1853, furnished supplies to the steamboat M. K. Wilson, of which a balance, amounting to \$274.52 remains unpaid, including \$50 for rent of office and desk-room for use of the steamer.

"I think the judgment, recovered by Hogg & Delamater, fixes the liability of the now defendants to contribute, to the present plaintiffs, an equal moiety of the amount paid to the deputy-sheriff by them.

"And that the relative proportions of interest each party had in the M. K. Wilson, does not affect this liability.

"In my opinion, the plaintiffs are entitled to judgment for \$359.19, with interest from May 29th, 1854.

"April 30th, 1857."

The defendant, Trask, excepted to the report of the referee in the above entitled action, and alleged the following grounds:—

"First.—That the referee has reported that the plaintiffs should recover judgment for \$432.47, when in fact nothing is due.

"Second.—That the referee erred in reporting that the judgment, recovered by Hogg & Delamater, fixes the liability of the now defendants to contribute to present plaintiffs an equal moiety of the amount paid to the deputy-sheriff by them.

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"*Third.*—That the referee erred in reporting that the relative proportions of interest each party had in the M. K. Wilson, does not affect this liability.

"*Fourth.*—That the referee erred in reporting that the plaintiffs are entitled to judgment for the \$359.19, with interest from May 29, 1854."

From the judgment, entered on the foregoing report, the present appeal is taken.

G. Dean, for appellants, defendants.

L. R. Marsh, for respondents plaintiffs.

BY THE COURT. HOFFMAN, J.—The general rule, that one partner cannot sue his co-partner for any payment or advance during the continuance of the relation, is not to be disputed.

In *Sadler v. Nixon*, (5 Barn. & Ad. R. 986,) this rule was applied, where all the three members of a firm had been sued, and judgment recovered. Upon an execution, the whole amount was paid by the plaintiff, who brought the action against one of the other members, to recover one-third of the amount. It was held, that the action would not lie.

The Court advert to the case of *Helme v. Smith*, (7 Bingham, R. 709,) and to the distinction of Chief-Justice Tindal, there made, that if it had been the case of co-partners, there would have been an end of the question; but part-owners were not necessarily partners.

In *Helme v. Smith*, the action was by a part-owner, and the managing owner of a vessel, against another part-owner, for his share of the balance due for the outfit of several voyages. The plaintiff was part-owner and ship's husband. The defendant was owner of one-fourth, and interested in one-fourth of the voyages. The voyages had been concluded, and the ship sold; but this latter fact is to be kept out of view, in ascertaining what the Court determined.

Thus, Gaselee, Justice, said:—"No doubt, if one partner advances capital to another, he may recover it by action; but my difficulty is, to know whether the expenses of outfitting a ship

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should form a portion of the general account, to be charged at the end of the voyage, or may be claimed at once."

And by Bosanquet, Justice :—" Before a voyage, the duty of each owner is, to contribute his share of the capital for the outfit of the ship. Here the ship's husband, being a part owner, at the request of the others, advances their shares for them: that constitutes a debt which he is entitled to recover, independently of the profits of the voyage. Of those profits we know nothing; but the debt is found."

Tindal, Chief-Justice, said :—" The question is, whether, if one part-owner lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense? There is nothing to show, that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration, if the voyage turned out to be without profit. It might have been otherwise, if, by the course of trade, the ship's husband was to look to the returns of the ship for the payment of his bill; but no such custom is stated, nor any thing to show that the plaintiff and defendant were partners."

The action was sustained for one-fourth of the demand.

The referee, in the present case, has found, (under an allegation in the answer, that upon an accounting, the defendants would not be found indebted to the plaintiff,) that the defendants are creditors of the boat, for the sum of \$274.52, the balance of an account.

The case is really, then, presented, upon these pleadings and proofs, of a concluded settlement, or at least, a liquidated state of the accounts, when this action was commenced; in which, upon the one side, the plaintiffs had a demand against the vessel of \$718.57, and the defendants \$274.52.

These relative demands being thus adjusted, there does not seem any good ground for refusing a right to recover, against the co-owners, separately, their proportionate amount.

We think, that when some of the joint-owners of a vessel have been sued, and judgment is recovered against them, (they omitting to plead the non-joinder of the others,) if some of them pay the amount, it is not an absolute rule, that they may not sustain an action for contribution, even pending the relation of joint-ownership. If it appear, that no accounts are outstanding, which may

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change the apparent liability of the party sued, or perhaps wholly displace it, the mere fact of the continuance of the relation of part-owners will not defeat the suit.

But then, what proportion of the sum paid by the part-owner is to be recovered?

We are at a loss to understand how it can be any more than an amount proportioned to the interest of the party sued. The action of the creditor settled nothing but the responsibility of the parties to him, and their responsibility *in solido*. (Collyer, p. 1050, § 1225.) The defendants in that action could not have restricted the recovery to a recovery against them, separately, for an amount in the ratio of their respective shares. The English rule and our own would not permit this, although in the ancient civil law, and in that of Holland, such a rule prevails. (Abbott on Shipping, p. 117.)

Between themselves, then, as to their respective liabilities for the amount thus paid, nothing was determined by the judgment in favor of the creditors; nothing could be there determined.

It must, then, be open to the part-owner to say, that supposing he can be sued as upon a liquidated demand, he is bound only to pay his aliquot part.

The case of *Batard v. Hawes* (20 Eng. L. & Equity Rep. 137) settled some points pertinent to the present. There were twelve joint-contractors, who had employed an engineer to make surveys and plans for their projected work. He was paid the amount of his demand by one of such contractors. The latter sued several of the others in separate actions. Some of the associates were dead. It was held, first, that the action could be brought against one separately; next, that he could recover only the aliquot proportion of the one sued, according to his interest at the time of the contract; although two were dead, when the action was commenced, the plaintiff could recover but one twelfth part from each.

The parties were not partners, but bound in a contract which might be looked upon as joint and several. Upon the second point, the Court say, "After entertaining considerable doubt on the subject, we have come to the conclusion, that the rule, most in conformity with the authorities, the principles of law, and the convenience of the case, is to look to the numbers of the original

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contractors for the purpose of determining the aliquot part which each contributor has to pay."

We think, that upon the established facts of this case, the plaintiffs were entitled to recover one-fourth of the sum paid, viz. : \$179.59, and are chargeable with one-eighth of the balance in favor of the defendants, or \$34.81. There remains due, then, \$145.28, with interest from the 29th of May, 1854.

The judgment must be so modified.

Ordered accordingly.

OWEN and LUGAR, Plaintiffs and Respondents, v. THE HUDSON RIVER RAILROAD CO., Defendants and Appellants.

1. In an action, by the owners of an omnibus or stage, against a railroad company, to recover damages for an injury to the stage, resulting from a collision between it and a car of the company, while the car is being drawn by horse-power; which collision is alleged, by the plaintiffs, to have been caused by the negligence of the company's servants; and which collision is alleged, by the defendants, to have been caused by the sole, or concurring negligence of the driver of the stage; and there is evidence tending to show negligence of both parties, which concurred to produce the injury; The true rule to be stated to the jury is, that if the collision and injury were caused by the concurring negligence of both parties, neither can recover against the other, and the defendants are entitled to a verdict.
2. In such a case, it is erroneous to instruct the jury, that if they "believed that the brakes of the car were not in good or sufficient working order, so that they were inefficient for the purpose of checking the progress of the car, and if they shall be satisfied that the driver of the car had time enough, after he discovered the dangerous position of the stage, to have avoided the collision by the application of the brakes, if they had been in good order, then the plaintiffs will be entitled to recover, notwithstanding the plaintiffs' driver was guilty of imprudence or carelessness in getting into such a position."
3. When the negligence of the company consists, in not having their car furnished with a suitable and efficient brake, in good working order; and although, but for such negligence, there might have been no collision and no injury, notwithstanding the plaintiffs were negligent; yet if the plaintiffs were, at the time, in fact, negligent, and if their negligence concurred with the defendants' negligence, to produce the injury, such facts present the case of an injury caused by the concurring negligence of both parties, and neither can maintain an action against the other, to recover any damages resulting from it.
4. It would seem, that when one of two persons, by his own negligence, is unexpectedly placed in a position of danger, from which he cannot be extricated unin-

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jured, without ordinary care, and a reasonable use by the other of the means, at the time, at his command, to prevent an injury to the former; and the latter sees the former, and the position in which he is placed, in time to prevent the injury, by the exercise of ordinary care, and by reasonable efforts on his part, in the use of such means, and he fails to exercise such care and make such efforts, and by reason thereof, the former is injured, the latter is liable. (See note at the foot of the case.)

5. In a case of such peculiar and extreme circumstances, the negligence of the defendant is proximate, and that of the plaintiff remote, and the injury, in judgment of law, is imputable solely to the party who had it entirely within his power to prevent it, by ordinary care in the use of the means then at his command to avoid it, but who failed to use such care, although seeing and knowing that the other party could not, at the time, by any act on his part, escape the threatened injury.

(Before DURE, CH. J., and HOFFMAN, and PIERREPOINT, J. J.)

Heard, Jan. 6; decided, Jan. 30, 1858.

THIS is an appeal by the defendants, from a judgment, entered on the verdict of a jury, in favor of the plaintiffs, for \$1187.73. The action was tried in May, 1856, before Mr. Justice Slosson and a jury.

Daniel Owen and Jeremiah G. Lugar, the plaintiffs, as partners, owned and run a line of stage omnibuses through the Tenth Avenue, in New York City, in which avenue the track of the road of The Hudson River Railroad Company, (the defendants,) is laid.

This action is brought to recover damages which the plaintiffs sustained, by a collision between one of their stages and the defendants' cars, on the 23d of February, 1853, while both were going up the Tenth Avenue, near 24th street.

It was also brought to recover damages sustained by them, from a collision between another of their omnibuses and the defendants' cars, on the 20th of July, 1853, near 26th street, in Tenth Avenue, when the cars and stage were going in opposite directions.

Both collisions occurred in broad daylight, and the avenue extends in a straight direction, both north and south of the place of collision, and objects could be seen in it, in either direction, to the distance of at least half a mile from the place of either collision.

The plaintiffs sought to recover, on the ground that each collision was caused by the negligence of the defendants and their servants, and without any fault or negligence of the plaintiffs or their servants. When the plaintiffs rested, the defendants' counsel moved for a nonsuit, on the grounds:—

"*First.*—That it appeared that the plaintiffs were guilty of negligence, which contributed to the accident.

"*Second.*—That it also appeared that the defendants were not guilty of any negligence which contributed to the accident.

"The Judge refused the nonsuit, and the defendants' counsel excepted."

The evidence given before the plaintiffs rested, and the motion for a nonsuit was made, tended to show that the driver of each stage was negligent, in getting into such a position, that a collision between it and the defendants' cars occurred.

The evidence, given before the testimony was closed, tended to show, that at the time of the collision, the brakes of the defendants' cars were not in good working order, and that if they had been, the drivers of their cars, after they saw there was danger of a collision, might have arrested their progress and prevented a collision, and that the want of sufficient brakes, in good working order, was the only negligence on the part of the defendants.

"The Judge charged the jury, that the plaintiffs in this case could not recover, if the carelessness of their servant contributed directly to the accident; but the Judge also stated, that that rule was subject to this qualification:—If the jury believed that the brakes of the car were not in good, or sufficient, working order, so that they were inefficient for the purpose of checking the progress of the cars; and if you shall be satisfied that the drivers of the cars had time enough, after they discovered the dangerous position of the stage, to have avoided the collision by the application of the brakes, if they had been in good order; then the plaintiffs will be entitled to recover; notwithstanding the plaintiffs' driver was guilty of imprudence or carelessness in getting into such a position. To which said qualifications, the defendant's counsel then and there excepted."

The other parts of the charge, not having been called in question on the appeal, are omitted.

The jury found a verdict for the plaintiffs. From the judgment entered therein, the present appeal was taken by the defendants.

William Fullerton, for the appellants.

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The charge of the Judge was erroneous. The rule, as first stated, was correct, and should have been permitted to stand, without the qualification to which it was made subject.

The obligation to use ordinary care is incumbent on a party who has suffered from a collision. The performance of this duty on his part, and the breach of the corresponding duty by the party sued, must concur, to entitle the plaintiff to damages sustained in a collision.

The general rule, resulting from the authorities, is, that a party suffering injury on a highway, in a collision with a railroad train, is entitled to damages, on proof, both of a want of ordinary care on its part, and the exercise of the same degree of care on his own. And if he was himself chargeable with a want of ordinary care, and thereby contributed to the injury, he is without remedy. This rule is without qualification. (*March v. Concord, R. R.*, 9 Foster, 48; *Moore v. Central R. R.*, 4 Zabris. 268, 824; *Runyon v. Central R. R.*, 1 Dutcher, 556; *Herring v. Wil. & Bal. R. R.*, 10 Iredell, 402; *Spencer v. Utica & Schen. R. R.*, 5 Barb. 837; *Sheffield v. Roch. & Syr. R. R.*, 21 Barb. 839; *Haring v. N. Y. & E. R. R.*, 18 Barb. 9; *Neal v. Gillett*, 28 Conn. 487.)

John Graham, for the respondents.

The qualification of the Court, in charging the jury, to the proposition as to the plaintiffs not being entitled to recover, if chargeable with negligence, was correct.

Both accidents amounted to *crassissima negligentia*, as against the defendants. The charge is directly within the principle of Carroll's case, (1 Duer, 571,) and of *Cook v. The Champ. Transp. Co.*, (1 Den., 91.)

Suppose the plaintiffs' stages to have been standing upon the tracks of the defendants' road, would that justify the defendants in injuring them, especially when, as in this case, it resulted from gross negligence on the part of the defendants' agents or servants? In trying to clear the tracks, the plaintiffs are in a more favorable position than if the stages had stood still upon them; and shall they not have the benefit of the same principle?

No matter how much exposed the plaintiffs' stages were to danger or injury—that will not excuse the defendants from the

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consequences of gross neglect. With reference to this, the plaintiffs were under no obligation to choose a position more or less liable to peril. It is evident, that if there had been no imprudence or carelessness on the part of the plaintiffs' driver in getting upon the track, that the defendants' gross negligence would still have existed, and, no doubt, have produced the same, or results equally serious as those it did. For every legal purpose, the horses might as well have been without bridles or reins—as the cars without brakes. Brakes will check the progress of the cars, when bridles might fail in restraining the horses. In the use of this means of conveyance, it is no more reprehensible to be without the one than the other.

The charge of the Court was equivalent to saying, that a want of ordinary prudence on the plaintiffs' part would be a fair offset to the same delinquency on the part of the defendants; but that if the collisions in question could not have been avoided by the exercise of ordinary care or prudence by the plaintiffs, or their agents or servants, the defendants were liable. This is undoubtedly familiar law. (*Butterfield v. Forrester*, 11 East. 60; *Bridge v. The Grand Junction R. R. Co.*, 18 Mees. and W. 244; *Davies v. Munn*, 10 id. 546.)

BY THE COURT. HOFFMAN, J.—It has become a settled axiom in our State, that if the negligence of a plaintiff who complains of an injury has contributed to produce it, he is not entitled to recover. (*Rathbun v. Payne*, 19 Wendell, 399; *Collins v. The Albany & Sch. R. R. Co.*, 12 Barbour, 492; *Munger v. Tonawanda R. R. Co.*, 4 Comstock, 349; 5 Denio, 255.)

This rule is modified by another, which is thus stated by Chief Justice Duer, in *Johnson v. The Hudson River R. R. Co.*, (5 Duer, 27.) "As the plaintiff in the action is not allowed to recover, notwithstanding the clearest proof of the negligence of the defendants, when it is also proved that his own negligence directly contributed to the accident, so the defendant is not shielded from a recovery, when it appears that but for his own subsequent negligence the accident would not have occurred; that is, when it appears that his own negligence was the sole proximate cause."

The doctrine thus stated was applied by the late Chief Justice in the case of *Williams v. The N. Y. & Harlem R. R. Co.*, tried

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December 14th, 1852. The law, as laid down in his charge, was affirmed at the General Term of this Court, (February 11th, 1854,) and by the Court of Appeals.

After stating the general rules, as to the necessity of finding the defendants guilty of negligence; and if so, then, next, whether the party injured had been negligent on his part; the learned Judge proceeded—"If the deceased was guilty of negligence in attempting to cross the track, or in jumping out of the wagon, still, if when he was on the ground, the driver could have stopped the car before it went over him, the plaintiff was entitled to recover."

To understand this, it is sufficient to observe, that the deceased was thrown from a wagon and run over by a car of the defendants, and that there was no little testimony to show that the car was driven at a great rate of speed, and that the driver made no attempt to check it when he discovered the situation of the party, and that he could have stopped the car so as to have avoided the accident.

This, then, was the case of a wilful neglect of ordinary means of avoiding the accident at the period of its occurrence. Had the driver of the car, in the present instance, wholly neglected to apply the brakes, the cause would have been similar.

But if the ruling of the learned Judge here is right, the most remote neglect of the company, or its agents, in the construction of its car, road, or equipment, would make them liable, whatever might be the fault of the other party. If they are responsible, because of the inefficiency of the brakes, they would be so for any deficiency or imperfection, no matter how far back it might be traced, which could be deemed to have contributed to the event. Indeed, it would, in principle, go far to give as entire protection to a traveller, or party grossly in fault himself, and to place him in the same position, as one who is wholly free from fault, and who has a guaranty for even these latent defects which ordinary diligence has failed to discover. See the cases collected in the valuable Treatise of Judge Redfield on Railways, p. 325, and notes.

Another exception was, to the charge as to the rule of damages. No point has been made by the defendants' counsel as to this, nor was any argued. We omit, therefore, to consider it.

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We think that there was error in the charge, and that there must be a new trial, with costs to abide the event.*

Ordered accordingly.

* In the case of *Button, administratrix of Button, deceased, v. The Hudson River Railroad Company*, decided by the Court of Appeals, in December, 1868, rules were declared which seem to cover the case of *Owen & Lugar v. The same Company*.

Margaret Button, as administratrix of her deceased husband, sued the company, on the allegation that the death of the deceased was caused by the negligence of the defendants, without fault on his part. The deceased, when first discovered, after he was injured, was found lying directly across the track, with his head on one rail and his feet on the other. How he came there, or how long he had been there, no witness was able to state. All that was proved was, that he had been drinking at an oyster saloon in the vicinity, and had left the saloon but a few minutes before he was found in this position.

The opinion of Mr. Justice Harris, of the Court of Appeals (which is understood to have been delivered as the opinion of that Court) affirms the following propositions:—

1st. Such testimony, alone, warrants no other finding than that it was the fault of the deceased that he was lying on the track in the position in which he was first discovered, and that he was not seen in time to stop the car before it reached him. On such a state of facts, the deceased was the cause of his own death, and the defendants were blameless, and, of course, are not liable.

2d. When an injury is produced by the concurring negligence of both parties, and the negligence of the plaintiff is as truly a proximate cause of the loss as that of the defendant, there can be no recovery, although the negligence of the defendant may be greater in degree than that of the plaintiff. (*Dowell v. The General Steam Navigation Company*, 5 Ellis & B. 195, and 32 Eng. Law and Equity R. 158; *Trow v. The Vermont Central Railroad Company*, 24th Verm. 487; *Hawkins v. Cooper*, 8 Carr. & P. 478; *Woolf v. Beard*, 8 Carr & P. 378.)

3d. "Where the negligence of the plaintiff is proximate, and that of the defendant remote, no action can be sustained. In such a case, the plaintiff himself is the immediate cause of the loss. This rule embraces all that class of cases where, at the time of the injury, the plaintiff was chargeable with a want of proper care. On the other hand, where the negligence of the defendant is proximate, and that of the plaintiff remote, the action may be sustained. The question, then, is, whether, it being concluded the plaintiff was not without fault, the defendant might, by the exercise of ordinary care and prudence at the time of the injury, have avoided it." (*Carwhacker v. The Cleveland, Columbus and Cincinnati Railroad Company*, 3 Ohio 172, N. S.).

One man cannot, by his own negligence, cast upon another the necessity of exercising extraordinary care. (*Dowell v. The Steam Nasigation Company*, *supra*.)

4th. To entitle the plaintiff to recover, it was necessary to prove, that prior to the injury of the deceased, he was seen on the track by the driver of the car in time to have enabled the driver, by the exercise of ordinary care, with the means then at his command, to arrest the progress of the car, and prevent the injury.—*Rep.*

PETER J. WETTERWULGH v. THE KNICKERBOCKER BUILDING
ASSOCIATION.

1. The twenty-second, of the Articles of the Knickerbocker Building Association, provides that "in case any member, by reason of sickness or removal from the city, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned."
 2. A member of this association, who has given notice, in due form, of his intention to withdraw, on the ground that he was "no longer able to continue the payment of his subscription to the said association, owing to various misfortunes, losses in business, sickness in his family, and the rigor of the time," in an action to recover back the money paid by him to the association, should be permitted to prove the truth of said alleged grounds for withdrawing, they having been set forth in his complaint, and denied by the answer.
 3. If he proves, that, owing to such causes, he was totally unable to continue the payment of his subscription, and that there was nothing in the pecuniary circumstances or condition of the association, furnishing any reason why the money paid to it by him should not be returned, he may recover it back, although the board of trustees may not have declared themselves satisfied as to the grounds of his withdrawal.
 4. It is not an indispensable condition to a member's right to withdraw, and to a return of his money, that, under any and all circumstances, the board of trustees shall declare themselves satisfied as to the grounds of his withdrawal. They have no right to withhold that declaration, arbitrarily, when no ground exists, or can be suggested, for withholding it.
 5. It was, therefore, error to exclude evidence of the truth of the grounds alleged by the plaintiff for his withdrawing, and to order a nonsuit, on the ground that in no event, and under no circumstances, could the plaintiff recover without proving that the board of trustees declared that they were satisfied as to the grounds of his withdrawal.
- Nonsuit set aside, and new trial granted, with costs to abide the event.

(Before HOFFMAN & PIERREPONT, J. J.)
Heard, Jan. 11; decided, Jan. 30, 1858.

THIS is an appeal, by the plaintiff, from a judgment dismissing his complaint, ordered at the trial, which was had in March, 1856, before Chief-Justice Oakley and a jury.

This action is brought by the plaintiff, as a member of the Knickerbocker Building Association, to recover from it the

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moneys he had contributed to it, on the theory, that he had ceased to be a member, under circumstances that entitled him to recover the moneys he had paid in, as a member.

The complaint alleges:—"That the defendants are a corporation or association, organized under, and in pursuance of the provisions of an Act of the Legislature of the State of New York, entitled, 'An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations, passed April 10th, 1851,' by the name of the Knickerbocker Building Association. That such organization was made by the filing of articles of association, pursuant to the provisions of the Act aforesaid, on or about the 24th day of February, one thousand eight hundred and fifty-two, as, by reference to the same, or authentic copies thereof, may appear.

"That, on or about the ninth day of February, one thousand eight hundred and fifty-two, the plaintiff became a member of the said association, in conformity to law, and the rules and regulations and by-laws of the said association, and continued such member thereof until on or about the seventh day of March, one thousand eight hundred and fifty-five, at which time the plaintiff shows, that being no longer able to continue the payment of his subscription to the said association, owing to various misfortunes, losses in business, sickness in his family, and the rigor of the times, the plaintiff, on or about the 7th day of March, 1855, gave notice, to the secretary of the said association, of his intention to withdraw from said association, pursuant to the requirements of the twentieth section of said articles of association."

It also alleges, that while the plaintiff was such member, and between the 9th of February, 1852, and the 7th of March, 1853, he paid into the association, in all, \$108, which he has demanded, and which they refuse to pay; for which sum, with interest, judgment is prayed.

The answer admits the organization of the defendants, and plaintiff's membership. Among other allegations, it contains the following, viz. :—

"That the said defendants admit, that on or about the seventh day of March, 1855, the plaintiff gave notice, to the secretary of the said association, of his intention to withdraw from the same;

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but, whether it was because the plaintiff was no longer able to continue his subscription to the said association, owing to various misfortunes, losses in business, sickness in his family, and the rigor of the times, neither the said association nor its officers have sufficient knowledge to form a belief, and the same is, therefore, denied; but the defendants allege, upon information and belief, that one of the principal reasons why the said plaintiff made the said application to withdraw from the said association, was, that the said association was in embarrassed circumstances, and had lost large sums of money by the maladministration and neglect of certain agents of the said association, and that the plaintiff was fearful of losing some portion of the moneys he had paid in, and was anxious to realize the amount of the said moneys, notwithstanding such withdrawal, would have the effect of injuring the several members of the said association; in the proportion of the plaintiff's claim to the total of their interests in the said association."

"And the defendants further allege, that the articles of the said association, as appears by article No. 20 of the same, require, that before any member shall be entitled to withdraw, and to be repaid the amount paid in by such member, he shall obtain the approval of the board of trustees of the said association; and it was part of the agreement of membership between the plaintiff and the defendants, that said board of trustees should, as a protection to all the members of said association, have and exercise the right of determining whether or not the application of the plaintiff to withdraw should be accepted, and the amount paid in repaid."

The entire proceedings at the trial, so far as the printed case furnished to the Court, on the appeal, shows any thing in relation thereto, were as follows, viz.:—

"The case came on to be tried at a Trial Term of this Court, on the 3d day of March, 1856, before the Honorable Thomas J. Oakley and a jury. Mr. Shannon, counsel for the plaintiff, then opened the case to the Court and jury, and then moved for judgment in favor of the plaintiff, on the pleadings, on the ground, that the plaintiff's complaint was admitted by defendants' answer."

"Mr. King, counsel for defendants, resisted said motion, for the reason, that before any member could withdraw from the associ-

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ation, he must obtain the consent of the board of trustees, and thereupon moved to dismiss the complaint. The said Justice denied the said motion of plaintiff for judgment. To which decision of the said Justice the plaintiff then and there excepted. The plaintiff then offered evidence to show that the plaintiff was unable, by reason of misfortune and sickness in his family, to continue the payment of his dues into the said association. Which evidence the said Justice refused to admit, on the ground of irrelevancy.

"To which decision the plaintiff then and there excepted.

"Whereupon the said Justice dismissed the plaintiff's complaint, with liberty to plaintiff to make a case or exceptions within twenty days, and to appeal to the General Term of the Court, without security."

The respondents' points state, that article 20 of the articles of said association, reads as follows, viz:—

In case of the death of any member, the amount paid into the society shall be refunded to his widow or next of kin, or shall belong to his executors or administrators, who shall enjoy the same benefits and advantages, and be subject to the same liabilities as the original holder enjoyed or was subject to. When there are more than one executor or administrator, the first name only, in the letters testamentary or of administration, shall vote at the meetings of the association; and in case any member, by reason of sickness or removal from the city, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned. Any person wishing to withdraw, for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent, and any member of more than three years' standing, shall be entitled to an interest of five per cent on the amount of funds paid by such member or members into the funds of the association.

Judgment having been entered in favor of the defendants, upon

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the order dismissing the complaint, the plaintiff appealed from the judgment to the General Term.

R. H. Shannon, for plaintiff and appellant.

Wm. B. Smith, for defendants and respondents.

BY THE COURT. PIERREPONT, J.—The plaintiff had been a member of the association more than “two years;” had paid in his money, and, so far as appears, was “clear of the books.” He had given the requisite notice of his intention to withdraw, alleging sickness and misfortune, which had rendered him unable to continue the payment of his subscription. The defendants having taken issue upon the allegations of sickness and misfortune, the plaintiff offered to prove them; but the Judge excluded the evidence as irrelevant.

The plaintiff, upon this argument, contends that, had he been permitted to show, that by reason of misfortune and sickness in his family, he was unable to continue the payment of his dues, he was then prepared to prove, that the condition of the association was such, that there was no legal or equitable objection to a repayment of the money as claimed by him, but that he was prevented in the outset from giving any evidence on the ground of irrelevancy.

In this view, we think the ruling was erroneous. Proof of the facts, which the plaintiff offered to establish, was, certainly, the first and appropriate step in the plaintiff’s case; and if he could not be permitted to prove them, no evidence of the condition of the association, nor any other evidence could be of any avail to him.

If the plaintiff had proved what he offered to prove, and had proved, in addition, such facts relating to the condition of the association as in law and good conscience ought to have satisfied the trustees, as to the grounds of the plaintiff’s withdrawal, then we think he not only had a right to withdraw, but was also entitled to a return of his money; and as his first step, we think, he had a right to give the evidence which was excluded.

The defendants insist, that the plaintiff must first show, that “the trustees were satisfied as to the grounds of withdrawal.”

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How the plaintiff was to prove that fact, it is not easy to see. To prove that trustees of a corporation are satisfied as to the grounds of withdrawal, when that withdrawal takes money with it, would be difficult.

We think the statute of 1851, under which this association was formed, gives no such arbitrary power to trustees, and imposes no such impossible conditions upon a member's right to a return of the subscription money paid by him to the association, who desires to withdraw from that association, by reason of sickness and misfortune.

New trial ordered, with costs to abide the event.*

* This case should, probably, be understood as merely deciding, that it is possible that a member's right to withdraw, and to a return of his money, may be perfect, although the board of trustees may have omitted, or declined to express themselves satisfied as to the grounds of his withdrawal.

The point is not decided, that in a case fairly calling for the exercise of judgment, whether the alleged grounds exist, or if a member has suffered from sickness, or misfortune; whether they have actually disabled him from continuing the payment of his subscription to the society; or whether they have merely made it inconvenient or undesirable to the member: the dissatisfaction of the board of trustees, as to the grounds of withdrawal, would not conclude him, and be an answer to a suit to recover back the money paid.

This case cannot be regarded as deciding, that if the association is in debt, and its assets are barely sufficient to pay its debts, much less, if they are insufficient, that a member, however unfortunate and poor, can withdraw and coerce a return of the whole amount of subscription paid by him to the association. The opinion clearly intimates the contrary.

The shareholders are declared, by the statute under which the association is organized, "liable to the creditors of the said association, to an amount equal to the amount of stock held by them respectively, for all debts contracted by such association."—Laws of 1851, p. 224, § 11.

In passing upon the truthfulness or sufficiency of the alleged grounds of withdrawal, and the extent to which they may affect a member's ability to continue the payment of his subscription; the board of trustees owe a duty, not only to the other members of the association, but to its creditors; and by the law of its organization, their satisfaction, as to the grounds of withdrawal, would seem to be a condition, as the general rule, to any member's right to withdraw, and be refunded the amount he may have paid on his subscription to the association.—*R.P.*

SAMUEL T. McDougall, Respondent, *v.* CHARLES E. FOGG,
Defendant and Appellant.

1. In an action upon a contract, by which the plaintiff covenants "to improve machinery for manufacturing gas, and to obtain a patent or patents therefor, and to assign to the defendant one undivided half of said patent or patents," and by which the defendant covenants "to pay to the plaintiff \$1000 when the patent or patents are issued;" which action is brought to recover the \$1000, after the plaintiff has obtained a patent for an alleged improvement, and assigned an undivided half of it to the defendant: it is competent for the defendant to allege, in his answer, and prove at the trial, "that the alleged improvement in said patent was worthless; had never been reduced to practice, and had been known, and tried, and abandoned as worthless, before the patent was issued to plaintiff."
2. Held, that the rejection of such evidence entitled the defendant to a new trial, he having excepted to its rejection.

(Before HOWMAN and PHILIPPOW, J. J.)

Heard, January 14; decided, January 30, 1858.

THIS is an appeal by the defendant, from a judgment entered in favor of the plaintiff, on the report of a referee. The action was brought to recover \$1000, and upon an agreement in writing, dated February 5, 1855, signed and sealed by both parties, in these words, *viz.* :—

"Charles E. Fogg agrees to advance Samuel T. McDougall \$500, to improve machinery for manufacturing gas, and to obtain a patent or patents on the same; he also agrees to pay Samuel T. McDougall \$1000 when the patent or patents are issued.

"In consideration for the above advance and payment, Samuel T. McDougall agrees to improve machinery for manufacturing gas, and obtain a patent or patents therefor, and to assign to Charles E. Fogg one undivided half of said patent or patents; and he further agrees to leave \$500 of the last payment in the business as capital, Charles E. Fogg paying a like amount (\$500) as capital: said capital to be used for joint account in selling patent rights and manufacturing and selling machines.

"Charles E. Fogg reserves the right to sell his interest in said invention to any person complying with the terms and conditions of this agreement."

The report of the referee states, not only the facts found by

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him, and his conclusions of law thereon, but it states the decisions made by him during the progress of the trial, to which the exceptions were taken, which alone are considered in the opinion of the Court delivered at General Term.

The report of the referee, after stating the making of the agreement above set forth, and the substance of it, is as follows, viz.:—

“That subsequently said plaintiff did obtain a patent for an improvement in the discovery for the manufacture of hydro-carbon vapor, (which was admitted on the trial to be an inflammable gas,) and did assign the one-half of his interest therein to said defendant, which assignment was duly recorded in the United States Patent Office at Washington, and that said defendant did pay to the plaintiff the sum of five hundred dollars, but made no other or further payment to him.

The defendant on the trial insisted, as a matter of law, that the plaintiff, in order to sustain his action, must show that he had actually improved machinery for manufacturing gas, and that the alleged improvement of plaintiff was useful, upon which proposition of law I ruled and decided that the issuing of the patent was *prima facie* evidence of utility.

“The defendant likewise insisted, that the plaintiff must prove that the patent had been reduced to practice, which proposition of law I overruled. The defendant likewise, at a subsequent stage of the case, offered to prove that the alleged improvement in said patent was worthless, had never been reduced to practice, and had been known, and tried, and abandoned as worthless before the patent was issued to plaintiff, which offer I overruled unless the defendant should first prove false representations of plaintiff alleged in the answer.

“The defendant then offered evidence tending to show, that the defendant and plaintiff had, after the making of the contract above referred to, settled the same by the payment of the five hundred dollars above mentioned; and that by a parol agreement between the parties, the said contract was discharged, and the defendant released therefrom; and that the said five hundred dollars so paid, was in full settlement of all plaintiff's claims upon defendant, arising out of the matter of this agreement. And upon this point, without deciding as a matter of law whether the said contract could be legally rescinded by such an agreement in parol, I

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find, as a matter of fact, that although there is considerable evidence tending to that point, yet, that it is not sufficient to warrant me in coming to the conclusion, that the said contract was thereby rescinded or discharged, or intended so to be, by the parties. I further find that no special damage to the plaintiff has been proved, on the trial of this action.

"And upon the above facts, so found by me, I find as a matter of law, that plaintiff is entitled to recover from the defendant the said sum of one thousand dollars, so by him contracted to be paid on the assignment of the one-half of said patent, with interest thereon, from the date of said assignment, August 27, 1855, to the date of this my report, amounting in all to one thousand one hundred and seventeen dollars and sixty-three cents, (\$1117⁶³₀₀.)

"All of which is respectfully submitted. Dated, N. Y., April 30, 1857."

"The false representations of plaintiff alleged in the answer," referred to in the referee's report, are to the effect, that before the agreement was made, and "some time in the autumn of 1854, the plaintiff called upon the defendant, and stated that he had invented a new apparatus, or machine, for manufacturing gas from a fluid called Benzole, and represented to this defendant that his said invention was of immense value, and that he was about to procure a patent for the same.

The answer alleges, that the defendant relied on these representations, and was induced by them to enter into the agreement, and that "they were utterly false and made without foundation."

When the plaintiff rested, the defendant moved to dismiss the complaint, on grounds stated in the opinion of the Court. The motion was denied, and the defendant excepted. He also, in due time, filed various exceptions to the decision of the referee, and the conclusions of law included therein.

Judgment having been entered upon the referee's report, the defendant appealed from it to the General Term.

A. B. Capwell, for appellant, contended that the plaintiff, in order to recover, must prove, affirmatively, that he had "improved machinery for manufacturing gas," and, also, that he had "obtained a patent or patents on the same."

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That the issuing of the patent was not *prima facie* evidence of the fact, that the plaintiff had improved machinery for manufacturing gas, or of the utility of the alleged invention. (*Curtis on Patents*, § 363, p. 406; 2 *Greenleaf's Ev.* §§ 493, 494, p. 407; *Earle v. Sawyer*, 4 *Mason's R.* 6.)

That the referee erred in excluding evidence to show that the alleged improvement was worthless, that it had never been reduced to practice, but had been known, and tried and abandoned, as worthless, before the patent was issued.

C. A. Nichols, for respondent.

I. The defendant makes, in his answer, no issue as to the novelty or usefulness of the invention.

II. The written agreement between the parties does not require that the invention should be useful, or reduced to practice, and no warranty as to a patent can be implied where there is a written agreement of sale. (*Van Ostrand v. Reed*, 1 *Wend.* 432; *Peltier v. Collins*, 3 *Wend.* 459.)

III. The finding of the referee is conclusive, as to the question of fact. (*Woodin v. Foster*, 16 *Barb. R.* 146.)

BY THE COURT. PIERREPONT, J.—The party who seeks to recover upon a contract containing mutual and defendant covenants, must show that he has performed his part of the agreement.

This contract states, that the plaintiff "agrees to improve machinery for manufacturing gas, to obtain a patent therefor, and to assign one undivided half to the defendant."

The plaintiff gave evidence tending to show, that he had procured a patent, and had assigned one-half of the same to the defendant, and that the defendant had paid him on account of this contract \$500. The defendant's counsel moved to dismiss the complaint upon various grounds; and among others, that the plaintiff had given no evidence tending to show that he had "improved machinery for manufacturing gas," as stipulated in the contract.

The referee held, that the obtaining of a patent was *prima facie* evidence of the utility of the invention. The defendant then "offered to prove, that the alleged improvement in said patent was

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worthless, had never been reduced to practice, and had been known, and tried, and abandoned, as worthless, before the patent to the plaintiff was issued."

This offer the referee rejected, unless the defendant should first prove the false representations, alleged in his answer; thus virtually ruling, not only that the patent was *prima facie* evidence that the plaintiff's invention was an improvement, but that it was conclusive, and of such a nature that no evidence could be given to rebut it, unless fraud was first shown.

We conceive the law to be quite otherwise. In the case of *Cross v. Huniley*, (13 Wend. 385,) the suit was upon a note given on the sale of a patent right, for an improved washing machine. The defence was, that the patent was of no validity, and, therefore, the note was without consideration. Witnesses were called to testify, that they had seen washing machines in use, prior to the granting of these letters patent, which, in material parts, corresponded with the machine in question. The defendant contended that the machine was not a new invention. Mr. Justice Nelson held, that the patent issued was invalid, and that the note given was without consideration, and that the plaintiff could not recover.

So in the case of *Head v. Stevens*, (19 Wend. 411,) the suit was upon several promissory notes, the consideration of which was the assignment of a patent right. The defendant was allowed to show, what the defendant in this case, in order to defeat a recovery, proposed, but was not permitted, to show. There are other like decisions, made by the Courts of this State, by the Courts of other States, and by the Courts of the United States. (Wright's Ohio R. 306; 11 Ohio R. 411; 4 Washington C. C. R. 13.)

The evidence offered and excluded, if uncontradicted, would establish, that the plaintiff had not improved machinery for manufacturing gas, and that the patent, the undivided half of which he had assigned, was not a patent of improved machinery; and that, as a necessary consequence, the plaintiff had not performed the covenant on his part—full performance of which was a condition, precedent, to his right to maintain this action.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Ordered accordingly.

THE STATE BANK at NEW BRUNSWICK, Appellants, *v.* METTLER,
et. al., Respondents.

1. To render a verbal promise valid, when made by the defendants, to a third person, to pay to the plaintiffs, creditors of the promisee, a debt which he owes to them, it must be founded upon a consideration, and arise out of a transaction, by force of which, the promisors become substantially the debtors of the promisee, in respect of the sum, and to the amount which they thus agree to pay, so that making payment, according to the terms of the promise, will be a satisfaction of their own debt, or the discharge of an obligation, resting upon them, as principals.
2. When the promise places the promisors in the position of sureties for the debt of their promisee, so that making the promised payment, will convert the promisors into creditors of the promisee, for the amount so paid, the case falls within the statute, and the agreement is void, if not in writing, though based upon a consideration sufficient to uphold it.

(Before BOSWORTH and HOWMAN, J. J.)

Heard, November 9th, 1857; decided, February 6th, 1858.

THE President, Directors and Company of the State Bank at New Brunswick, in the State of New Jersey, are the plaintiffs in this action, and Samuel Mettler, J. Spaulding Reynolds and William F. Mettler are the defendants. It now comes before the Court, at General Term, on an appeal by the plaintiffs, from a judgment, in favor of the defendants, entered on the report of a referee, to whom it had been referred to hear and decide it.

It is brought to recover the amount of an unaccepted draft, or bill of exchange, drawn by John Mettler, on Mettler, Reynolds & Co., the defendants, upon an alleged promise to pay the same.

The complaint, in substance, alleges:—

I. That John Mettler, of New Brunswick, N. J., prior to the 12th of April, 1852, was engaged in business there, as a grain-merchant; that Samuel Mettler, of New York City, before and at that date, was a grain and flour commission merchant, and in business as such in the City of New York, as one of the defendants' firm.

II. Before that date, he, (Samuel,) had been a member of the firms of "Lane & Mettler" and "Stewart & Mettler," after which the firm

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of "Mettler, Reynolds & Co." was formed, all of them, in turn, prosecuting the same business.

III. For about eleven years prior to the 12th of April, 1852, either the said Samuel alone, or his said firms, received, from time to time, consignments of produce from said John, to be sold on commission, "with the understanding and agreement," between said John and Samuel, or the said John and the various firms aforesaid, that John "might draw for moneys" on Samuel, or said firms respectively, against such consignments, and that such drawee, or drawees "should accept and advance moneys on said drafts, and reimburse himself or themselves out of the proceeds of such consigned property," "being allowed the customary charges and commissions on such advances, and making such sales." Such was the "nature of the understanding and agreement existing between the said" John and the defendants, on the 12th of April, 1852.

IV. On the 12th of April, 1852, in pursuance of such understanding, John Mettler made his draft as follows:—

"New Brunswick, April 12th, 1852.

"\$4000.

"Thirty days after date, for value received, pay to John B. Hill, Cashier, or order, four thousand dollars, and charge the same to my account.

"JOHN METTLER.

"METTLER, REYNOLDS, & Co.

"64 Dey street, N. Y."

The plaintiffs received it from John Mettler, on the day of its date, and advanced to him its full amount, less the legal discount, "under the full faith and confidence, that the same would be duly accepted and paid."

V. On the 15th of May, 1852, it was presented for payment, which was refused. The defendants had, previously, refused to accept it, on the alleged grounds, that they had no property of the drawer in their hands, and he was then indebted to them, the truth of which, the complaint denies, on information and belief.

VI. The money, so advanced on the drafts, was applied, by John, to pay for grain he had on hand, of the value of about

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\$12,000, which John was to consign to the defendants, "under the understanding, and in the course of business aforesaid, and part of which was on the way to be delivered to said defendants, under said arrangement." All the grain mentioned in this paragraph came to the hands of the defendants, and was converted to their own use.

VII. "And the said plaintiffs say, that between the said twelfth day of April, A. D., 1852, and the fifteenth day of May, A. D., 1852, the said defendant, in consideration that the said John Mettler would permit the property he had consigned to said defendants to come to their hands, and would turn over or transfer to them, or to said Samuel Mettler, all the produce the said John Mettler then had on hand, and confess a judgment to the said Samuel Mettler or the said defendants, under which said Samuel or the said defendants might sell the real and personal estate of said John Mettler, and receive the avails thereof, they, the said defendants, would accept and pay such drafts as were held by any banks at the date of such promise; and confiding in such promise, the said John Mettler permitted the consigned property to come to the hands of said defendants, as proposed, and turned over and transferred to them all the produce of the said John Mettler, and confessed to them a judgment according to the terms so proposed to him. And in pursuance of such permission, transfer and judgment, the said defendants received a large amount of property of the said John Mettler."

VIII. At the date of such transfer and agreement, the plaintiffs held and owned the draft, and the whole amount of it was due to them, as the defendants then knew. But though requested to do so, the defendants have not, and would not pay, to the plaintiffs, any part of the draft, and the whole amount of it is due to the plaintiffs.

IX. The plaintiffs, when they received the draft, were, and since have been, a banking corporation, duly created by the laws of New Jersey. Judgment was demanded for \$4000, with interest from the 15th of May, 1852, and the costs of the action.

The answer was in these words, viz.:—

"The defendants, for answer to the plaintiffs' complaint, admit, that before the 12th day of April, 1852, John Mettler was engaged in business in New Brunswick, State of New Jersey; that Samuel

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Mettler was, on the 12th day of April, 1852, engaged in business with J. Spaulding Reynolds and William F. Mettler, under the firm of Mettler, Reynolds & Co., the defendants in this action; and that before the 12th day of April, 1852, said Samuel Mettler had been engaged in business under the firm of Lane & Mettler, and under the firm of Stewart & Mettler, in the City of New York.

"Defendants, further answering, deny each and every other allegation in said complaint, except those hereinbefore admitted."

The referee made a report of the facts found by him, and of his conclusions of law, as follows:—

"I do report, that the plaintiffs, at the time of commencing this action, and for several years prior thereto, were a banking corporation duly authorized, by the laws of the State of New Jersey, to do business as such, under the above-named title, and are the lawful owners of the draft, a copy of which is set forth in the complaint.

"That the defendants were on the 12th day of April, 1852, and had been, from February previous thereto, flour and commission merchants, doing business in the City of New York, and succeeded the different firms and persons in the same business as set forth in the complaint.

"That John Mettler, a brother of the defendant, Samuel Mettler, had been living in New Brunswick, engaged in the produce business for about twelve years, prior and up to May, 1852; that during this period, the course of business existed between John Mettler and the plaintiff, and the defendants and the several firms to which the defendants succeeded during the several periods in which they were respectively engaged, substantially as set forth in the complaint. That on this 12th day of April, 1852, John Mettler drew the draft, set forth in the complaint, for \$4000 at thirty days on the defendants; that the plaintiffs discounted it, and sent it to the defendants for acceptance, which was refused; that the proceeds of this draft were chiefly used to pay on the account of grain which John Mettler had bought, and which finally came to the hands of the defendants, under the agreement with John Mettler to pay the plaintiffs hereinafter mentioned; that after the draft had been presented for acceptance, and before the same became payable, John Mettler, having a large amount

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of grain at different places in the country, and on the way to New York, refused to allow the grain to go forward to the defendants, and told them he would turn it over to the plaintiffs unless defendants would accept and pay this draft and others coming due at the banks; that the defendants refused to accept this and other drafts, but agreed with John Mettler that John should allow all the grain to go into their hands, and should assign to them certain canal barges and his other personal property, and confess a judgment to them to bind his real estate, in consideration of which the defendants agreed to settle and pay this draft to the plaintiff; that John Mettler did turn the grain over and assign all his personal property, and did confess a judgment to the defendants as was agreed between them, but the defendants have not settled and paid this draft to the plaintiffs as they agreed with John Mettler to do, and the whole amount of the same remains due and unpaid. And upon the foregoing facts, I find and decide, as matter of law, that the plaintiffs are not entitled to recover in this action, and that the complaint should be dismissed, and I give judgment for the defendants, dismissing the same with costs.

"Dated, New York, February 28th, 1857."

The plaintiffs, in due time, filed various exceptions to the decision of the referee. A judgment having been entered on the report of the referee, the present appeal from it was taken by the plaintiffs. It is unnecessary to give any further statement of the evidence than is contained in the opinion of the Court.

Wm. Curtis Noyes, for appellants.

E. S. Van Winkle, for respondents.

BY THE COURT. BOSWORTH, J.—The complaint states, and the referee finds, that for about eleven years prior to the transaction in question, either S. Mettler alone, or the firms of which, during that period, he was a member, received, from time to time, produce from John Mettler, upon an agreement between him and S. Mettler, or the firms of which the latter was a member, that John Mettler might draw against such consignments, and that S. Mettler, or his firms, should accept and pay, and reimburse themselves out of the proceeds of the property so consigned.

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That was the relation existing, between the defendants and John Mettler, when the latter drew and the plaintiffs discounted the bill in question, and when the special promise, found by the referee, was made.

The produce which John Mettler threatened to stop, and withhold from the defendants, was allowed, in consequence of the special promise, found by the referee to have been made, to go into the defendants' hands under that previous and subsisting arrangement, and on the terms of that arrangement only, except in so far as that arrangement was modified by the special promise itself.

The referee does not find, that the produce and other property was bought, by the defendants, of John Mettler, or that they agreed upon its value, or upon any price at which it was to be accounted for. The fact that John Mettler was, as a part of the transaction, to confess a judgment to the defendants, so as to bind his real estate, imports, that such judgment was to be confessed as a security for such sum as he might then owe them, or for such liabilities as they had incurred, or might incur, for him, or both.

It is, therefore, quite clear, as we think, that the facts found establish, that the defendants did not purchase, of John Mettler, the grain which was sent forward, or the canal barges, or the other personal property which he transferred to them. Their promise to him to settle, and pay to the plaintiff, the bill in question, was not a promise to pay the whole or a part of the price of property which they had bought.

Was it a promise to apply the proceeds of the property transferred, in consideration of such transfer, by paying such proceeds to the plaintiffs in satisfaction of such bill? The referee's finding does not state the promise in this form. If such could be deemed to be its effect, or meaning, it is not found that the property transferred was, in value, equal to the amount of the bill in question, nor is it found that they had, or could have, realized enough from the property to pay it.

To take the case out of the statute of frauds, the verbal promise of a third person, made to a debtor of the plaintiffs, to pay to the latter a debt which the promisee owes them, must find its consideration in a purchase of property from the promisee, so that the amount which is promised to be paid, is to be paid in discharge of the proper debt of the promisor, or the transaction and

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promise must be such, that, making the promised payment to the plaintiffs, as creditors of the promisee, will operate, incidentally, as a satisfaction of the debt of the latter, and, primarily, as payment of the debt of the promisor. (*Jackson v. Raynor*, 12 J. R. 291; *Farley v. Cleveland*, 4 Cowen, 432; *S. C. in error*, 9 Id. 639; *Ellwood v. Monk*, 5 Wend. 285; *Johnson v. Gilber*, 4 Hill, 178; *Barker v. Bucklin*, 2 Denio, 60.)

When the promisor has received from the plaintiffs' debtor property of the latter, upon an agreement to sell it, and pay the proceeds to the plaintiffs, in satisfaction of a debt which the promisee owes them, the plaintiffs may sue on such promise, and recover the amount of the proceeds, if they shall have been informed of, and shall have assented to the arrangement prior to the receipt of the proceeds by the promisee. (*Seaman v. Whitney*, 24 Wend. 260.)

But, as already remarked, no such fact is found to exist in this case.

This case, as the facts found present it, is one in which the defendants claimed, at the time of the promise, to be creditors of John Mettler. The referee has not found whether they were or not. The testimony is uncontradicted, that they were then under liabilities for John Mettler to the amount of at least \$25,000. One of the instruments of transfer, purports to be made in consideration of the indebtedness of John Mettler, by reason of advances and acceptances made by the defendants for him, and authorizes the proceeds of the property, so transferred, to be applied to satisfy the advances thus made, and the liabilities incurred, by reason of such acceptances.

Hence, the defendants were anxious to obtain a judgment against John Mettler, by confession, as well as a transfer of the canal barges and of his other personal property, and to receive his produce to be sold and applied, under the arrangement then subsisting between them.

To obtain these securities they promise him, that they will settle and pay the debt in question to the plaintiffs. It is a promise to him to pay a debt he was owing to the plaintiffs. It was not a promise to satisfy a debt owing by themselves, by making payment of it to the plaintiffs, instead of John Mettler.

It was, therefore, strictly and literally a promise to pay the debt

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of another. Conceding the consideration to be sufficient, the agreement was not in writing.

To make a promise of one person to pay the debt of another valid, it must not only be in writing, but must also, in all cases, be founded upon a sufficient consideration.

It is not enough, to take such a verbal promise out of the statute, that it is founded upon some consideration of value received by the defendant: for, in all cases, in which the creditor is not a party to the contract, the consideration must consist of something beneficial to the promisor, or of damage, to which the promisee submits.

I do not think there is any such established distinction as that, if the consideration consists of harm to the promisee, (the one owing the debt to be paid,) the agreement, to be valid, must be in writing, but need not be, if it consists of something beneficial to, and received by the promisor, no matter what such consideration may be.

In the latter case, to render the promise valid when not in writing, it must be founded upon a consideration, and arise out of a transaction, by the terms, or by force of which, the promisor becomes substantially the debtor, of the promisee, in respect of the sum, and to the amount which he thus agrees to pay, so that making payment according to the terms of the promise will be a satisfaction of his own debt, or the discharge of an obligation resting upon him as a principal. When the promise places the promisor in the position of a surety for the debt of his promisee, the case falls clearly within the statute, and the agreement is void. (*Barker v. Bucklin, supra; Brown v. Curtis, 2 Coms. 225; Brewster v. Silence, 4 Seld. 207.*)

Payment by the defendants to the plaintiffs, of the bill in question, would make the former creditors of John Mettler for the amount paid. He would be obliged, (if able,) to refund it, if the property transferred should prove insufficient to pay any part of it, after satisfying their other liabilities for him.

In our opinion, on the facts as found, the promise which the referee holds to have been established, is a promise to pay the debt of John Mettler, and is void, because the promise and the consideration of it are not contained in a written agreement, signed by the defendants.

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If we did not regard this view as free from reasonable doubt, we should consider it the duty of the Court to reverse the judgment, set aside the report, vacate the order of reference, and order a new trial, on the ground that the evidence does not warrant the finding that "the defendants agreed to settle and pay this draft to the plaintiffs," absolutely and unconditionally.

John Mettler's deposition is the only evidence which can be claimed to establish the fact as found. To the eighth direct interrogatory he says, "I then turned over the grain to the defendants, in consideration of their promise to settle with said plaintiffs and my other creditors." "The defendants agreed to have the drafts settled with other creditors, if," etc.

To the ninth, he says, "I turned over the grain on condition that the defendants would settle with the plaintiffs for the amount of said draft and my other creditors."

The answer to the tenth adds nothing. These answers show as strongly, that the defendants assumed and agreed to pay all the debts of John Mettler, as that owing to the plaintiff.

The answers, to the cross-interrogatories, recall every thing contained in the answers to the direct, tending to show an unconditional promise to pay; *vide* answers to the fifth and sixth cross interrogatories. "It was the understanding that the defendants should pay themselves, first, out of the property, and then apply the balance in payment or compromise with my other creditors." This transaction was on the 23d of April, 1852. The transfers were made on the 27th, 28th and 29th of April, 1852.

The only promise which this evidence authorized the referee to find, was a promise to convert the property, and, after applying the proceeds, to pay, first, the amount due to the defendants, and satisfy their liabilities for John Mettler; and next, apply the balance to pay, or in compromising with his other creditors.

If, therefore, the defendants would run any serious risk of being ultimately held liable, upon the facts as found, to pay the draft in question, the judgment should be reversed and a new trial granted, because the fact of the promise being made as stated, is wholly unwarranted by the evidence.

But we cannot doubt that the promise is one to pay the debt of another, and, not being in writing, is void. The defendants have not appealed from the judgment, and are not strictly in a position

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to insist that the facts are erroneously found. They have not appealed, and therefore have not placed themselves in a position to have a review, upon the evidence, of the conclusions of fact.

We think the judgment should be affirmed, on the ground that the facts as found create no legal liability on the part of the defendants to pay to the plaintiffs the bill or draft in question.

Judgment affirmed.

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1. By the rules of the common law, a factor, to whom goods are consigned for sale, has no authority to pledge them.
2. If without an express authority, he pledges, as owner, the goods or the documents of title entrusted to him, he is guilty of a violation of his trust, although the moneys raised by him are applied to the use of his principal; and such a pledging, as tortious and void, passes no title, and can create no lien.
3. On the contrary, such an act gives to the owner an immediate right of action for the recovery of the goods, or of their value, against the innocent pledgee, who is not allowed either to bar a recovery or reduce its amount, by any inquiry into the state of the accounts between the plaintiff and his unfaithful agent.
4. The contracts with a factor or agent, which, although void at common law, are rendered valid by the provisions of the third section of the New York Factors' Act, (Session Laws of 1830, chap. 179, 3 R. S., 5th ed., p. 75,) belong to two classes: first, where the transaction is founded on the documentary evidence of title mentioned in that statute; second, where it rests exclusively on the factor's possession of the goods; that possession being the sole evidence of his ownership.
5. As to the first class, the documents of title specified in the statute are: 1st, a "bill of lading;" 2d, a "custom-house permit;" and 3d, a "warehouse-keeper's receipt for the delivery of any such merchandise," *viz.*: the merchandise described in the first and second sections, as shipped from some other port, foreign or domestic.
6. To render a contract with a factor, made on the faith of either of these documents, valid, as against the owner of the merchandise, it must either appear on the face of the document, that the factor is the owner, or its terms must be entirely consistent with the supposition, that he is so; and the other party to such contract must not have notice, otherwise, that such factor is not the owner.
7. And such document must not merely be exhibited, but must be transferred and delivered to the person advancing his money or credit in reliance on the ownership which it furnishes; and it must appear, that such document was transferred and delivered when the advance, it was intended to secure, was made. These acts must be simultaneous.

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8. And the effect of this transfer must be either to vest in such person a title to the property, or the exclusive right or means of obtaining the actual possession.
9. When the Act of 1830 was passed, the only "custom-house permit," known to the law, was that which was granted to a consignee, when the goods mentioned in his invoice and bill of lading had been duly entered at the custom-house, and the duties thereon had been paid or secured to be paid.
10. The "permit" for the landing of goods, on which the duties are not paid, to the end that they may be stored in a bonded warehouse, as authorized by the Act of Congress, passed August 6, 1846, and the subsequent Act amending the same, is not such a document, or "custom-house permit," as is meant by or provided for, in the New York Factors' Act.
11. "A warehouse-keeper's receipt," as that phrase is used in the New York Factors' Act, means the receipt of the keeper of a private warehouse, in which the person named in the receipt has deposited the goods for safe keeping; and, by its terms, binds such warehouse-keeper, upon the surrender of the receipt, to deliver the goods to the bearer of it, or to the holder of it, if duly endorsed to him. It does not include such a receipt as the keeper of a bonded warehouse on receiving goods for storage therein, on which the duties are unpaid, is authorized by the Acts of Congress to give.
12. To render the contract valid, it must also appear, that the document transferred, being such as the statute describes, had been entrusted to the factor by the owner of the goods.
13. To satisfy the word, "entrusted," such document must have been delivered or transmitted by the owner of the merchandise personally, or by his authorized agent; or it must have been obtained by the factor in the proper and ordinary mode of discharging the duties of his trust.
14. When a factor attempts to pledge the goods of his principal, by the transfer of any document of title not mentioned in the New York Factors' Act, it is, by the rules of the common law, and by those alone, that the validity of the pledge, as against the owner of the goods, must be determined.
15. The possession of goods by a factor "not having the documentary evidence of title," that can alone enable him to create a pledge valid as against the owner, is an actual, as distinguished from a constructive possession.
16. It is only when such is the character of the factor's possession, and only by the transfer and delivery of the goods themselves, that a valid pledge, under this provision in the statute, can be effected.
17. When goods are shipped by the owner of them from a foreign port, consigned to his factor for sale, and the duties not being paid, they are stored in a bonded warehouse, they are in the actual custody of the collector of the port at which they are landed, and the factor's possession of them is constructive only. That is not such a possession as will enable the factor to make a valid pledge of them, otherwise than by the transfer and delivery of such a document of title as the statute (of 1830) describes.
18. In all cases, to render the contract valid, the change of possession, whether actual or constructive, must be made at the time of the advance, which the pledge is intended to secure.
19. When the attempt by a factor to pledge the goods of his principal, is made to secure a then present advance, if it fail in the requisites to give it validity, under

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- the third section of the New York Factors' Act, it is wholly void—void at the common law, and not within the provisions of the fourth section of that Act.
20. Under the fourth section of the New York Factors' Act, to render the contract valid, there must be an actual transfer of the goods themselves; or, if the transfer and delivery of a document of title, will, under that section, create a lien upon the goods in favor of the person taking it in deposit, to the extent of the factor's claim against the owner, then there must be an actual transfer of the statutory document of title.
21. The same transfer of possession is necessary under the fourth section, when possession without documentary evidence of title is relied upon, and the documentary evidence of title must be of the same description, when documents are relied upon, as is necessary under the third section, to give validity to a transfer for a present advance.

(Before DUKE, CH. J., BOSWORTH, SLOSSON and WOODRUFF, J. J.)

Heard, July, 1857; decided, February 6, 1858.

THIS is an appeal, by the plaintiffs, from an order denying a motion for an injunction *pendente lite*, as prayed for in their complaint. The plaintiffs in this action are Charles Bonito and Antonio Duque, composing the firm of Bonito & Co., doing business at Bogota, in the Republic of New Grenada.

The defendants are Tomas Cipriano Mesquera and Anibal Mosquera, composing the firm of Mosquera & Co., Clinton Hitchcock and Richard A. Reading, composing the firm of Hitchcock & Reading, and Samuel F. Tracy. The firms of Mosquera & Co., and Hitchcock & Reading, do business in the City of New York.

This action is brought on the allegation, that, between the 1st of November, 1855, and the 1st of August, 1856, Bonito & Co. shipped and consigned to Mosquera & Co., to be sold by the latter, for and on account of the former, some 1639 ceroons of quina, (commonly called Peruvian bark,) under a previous written agreement between them, on or about the 9th of July, 1855, in relation thereto, to the effect, that Mosquera & Co. should advance to the plaintiffs \$25, U. S. currency, for each ceroon, containing 100 lbs. net, the plaintiffs drawing bills for such advance, at 90 days sight upon the bill of lading from Honda, which is a shipping point upon the Magdalena River; the plaintiffs to allow Mosquera & Co. a commission of two per cent. upon the sales of said bark, "and that upon the bills of lading which they would receive, the said Mosquera & Co. should ensure the said bark from Honda, at a valuation of forty hard dollars for each one hundred pounds thereof."

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The complaint also alleges that a shipment was made by the plaintiffs to Mosquera & Co. on the 9th of November, 1855, of 535 ceroons, containing each about 112 pounds, only 170 ceroons whereof came to the possession of Mosquera & Co., by reason of the wreck of the vessel, on which such bark was shipped. Bills were drawn by the plaintiffs, on this shipment, amounting to \$16,500, which Mosquera & Co. accepted and paid, thus advancing that sum.

The complaint also contains allegations, on which the plaintiffs seek to charge Mosquera & Co. with the value of the ceroons lost, and with the damage to those saved, by reason of the latter having omitted to insure the 535 ceroons against loss or damage from the perils of the seas, on their voyage from the place of shipment to New York.

The complaint alleges the making of other shipments to Mosquera & Co., under the alleged agreement between them, and that, of the whole shipments, there remain 1539 ceroons, which are described by marks that identify them, not "sold or disposed of, but that all of the same is now stored in one of the bonded warehouses in the City of New York, subject to the lien of the U. S. Government thereon, for the duties chargeable on the importation thereof." (This allegation is not controverted by the answer of either defendant.)

The complaint states the advances made by Mosquera & Co., by their accepting and paying bills drawn by the plaintiffs on them, and the bills drawn and accepted, but outstanding and unpaid when this suit was commenced, the amount of the lien which Mosquera & Co. claim to be due to them, and the plaintiffs' objection to items of such claim.

The complaint, which was verified on the 29th of November, 1856, also states that Mosquera & Co. "have recently made a general assignment of their property and effects to the defendant, Samuel F. Tracy, in trust, for the benefit of their creditors," and that such assignee claims to be vested "with all the rights, claims and liens of said Mosquera & Co."

It also alleges that the defendants, Hitchcock & Redding, claim to have a lien on the bark, as security for advances made by them to Mosquera & Co., and to have the possession and control of said bark, or of the warehouse receipts therefor, so as to enable them

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to withdraw the same on payment of the duties; and it also alleges, that if Hitchcock & Reading have made any advances, they made them without the knowledge, consent or authority of the plaintiffs.

It states the plaintiffs' desire to withdraw the said 1539 ceroons, and their readiness to pay, and, in it, they offer to pay any balance justly due to Mosquera & Co.; and also states their apprehensions that the defendants, or some of them, will sell the bark, unless restrained by order of the Court; that the value of the ceroons, over and above the duties thereon, is about \$50,000; demands an accounting, and prays judgment that the ceroons be delivered to them upon their paying the balance, found due, to whichever of the defendants the Court may determine to be entitled to it, and "that pending this action, the defendants may, by the injunction order of the Court, be enjoined and restrained from selling, pledging, encumbering, disposing of or interfering with the said 1539 ceroons," and for the appointment of a receiver, and for such further or other relief as may be agreeable to law and equity.

On the 8d of December, 1856, an order was made, requiring the defendants to show cause, on the 9th, why an injunction *pendente lite* should not be granted, and in the mean time enjoining the defendants, as prayed by the complaint.

The order to show cause was adjourned from time to time, and was heard in June, 1857, before Mr. Justice Hoffman, on the verified complaint, and on verified answers of all of the defendants.

On the 20th of June, 1857, he made an order, vacating the order of the 8d of December, 1856, and denying the plaintiffs' motion for an injunction, *pendente lite*, "upon the defendants Clinton Hitchcock and Charles A. Reading executing and filing, with the clerk of this Court, an undertaking to keep an account of the sales and disposition of the 1539 ceroons of bark referred to in said complaint, if sold by them, and to pay over to said plaintiff the proceeds of the same, or such part thereof as they may be finally adjudged entitled to, as against the said Hitchcock & Reading."

From that order, the plaintiffs appealed to the General Term, and it is upon that appeal that this action now comes before the Court.

The defendants, Mosquera & Co., and S. F. Tracy, who united in the same answer, admitted, that on or about the 9th of July,

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1855, the plaintiffs and Mosquera & Co. entered into an agreement with each other, respecting the shipment and consignment, by the former to the latter, of quina for sale on commission, to the effect of that set forth in the complaint, except that (as they allege) Mosquera & Co. did not obligate themselves to effect insurance upon the said bark, "otherwise than that, upon receipt of the bills of lading of said bark, showing when, where, and in or upon what boat, or *champan*, the same was shipped, they would use reasonable and proper diligence in endeavoring to effect insurance thereon, but, otherwise than this, they deny the allegation of the complaint." It controverts the allegations of the complaint, on which the plaintiffs seek to charge Mosquera & Co. with liability, for omitting to ensure the bark damaged and lost.

They also "admit, that the 1539 ceroons of bark, in the complaint mentioned, have not been sold, and that the same have been, and are, deposited in the bonded warehouses of the city, subject to the duties of the United States, and storage, and other charges thereon." They allege, that on the 16th of December, 1856, "there was due, and owing by the plaintiffs to Mosquera & Co., and their said assignee," for advances, interest and commissions, the sum of \$59,928.57, over and above all offsets, counter-claims and demands whatsoever: this sum includes Mosquera & Co.'s acceptance for \$8000, which was past due, outstanding and unpaid.

They insist that this sum of \$59,928.57 is a lien on the said 1539 ceroons.

They admit that Mosquera & Co. failed, and on the 22d of October, 1856, assigned all their property and effects to the defendant Tracy, including their demand against the plaintiffs, and their right to and lien on the bark, and allege that Hitchcock & Reading "have a valid lien and claim thereon, for advances actually made by them to the said Mosquera & Co., in good faith, and without notice of any right, title, or interest therein, of the plaintiffs, or otherwise, as stated in their answer in this action."

Hitchcock & Reading, in their answer, allege that they have made advances to Mosquera & Co., on the pledge and security of 2110 ceroons of bark, (in which are included the 1539 ceroons in question,) to the amount of \$76,704.58, over and above all sums refunded, and claim the right to hold the bark to reimburse such advances, interest accrued and to accrue thereon, with other

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charges and expenses, for insurance, storage, and duties and commissions, and brokerage upon the sale of such bark.

They deny having any knowledge, notice or information, at the time of making either of their advances, that the plaintiffs had any interest in the bark, or had ever shipped it, or any of it, to Mosquera & Co.; but "admit, that since the failure of Mosquera & Co., on or about the 22d of October, 1856, but not before that time, they had been informed that on or about July, 1855, some agreement was made or entered into, between said Mosquera & Co. and the plaintiffs, respecting the shipment and consignment to them of quina, or Peruvian bark, for sale upon commission, and in respect to advances to be made thereon."

They allege, that early in July, 1856, "said firm of Mosquera & Co. applied to them for a loan or advance of their negotiable promissory notes to the amount of \$32,000, upon the pledge or security of the following 408 ceroons of quina or Peruvian bark, each ceroon being marked as follows, that is to say"—(describing them by their marks, and these 408, being part of the 1539 ceroons) "and upon the pledge or security of 438 other ceroons of quina bark," (366 of which are parcel of the 1539 in question.) "All which 438 ceroons the said Mosquera & Co. stated, to said defendants, they had on the way from Santa Martha, and, as they supposed, were then near at hand." . . . That at the time of said application, and of the advance of the notes for \$32,000 hereinafter mentioned, "said defendants were informed by Mosquera & Co., and they believed, and now state, on information and belief, and according to the fact, that said Mosquera & Co. then had in possession, in store, in the City of New York, all said 408 ceroons, stored in their own names, at their own risk, and subject to their own order, and that said 438 ceroons were then on the way to Mosquera & Co., from Santa Martha, and arrived on or before the 12th day of July, 1856, at the port of New York."

. . . "That on said application, and about the 5th of July, 1856, upon the security and pledge of said bark, then made and given, and upon the faith and belief that Mosquera & Co. were the owners thereof, they advanced and delivered, to said Mosquera & Co., their promissory notes, amounting, in the aggregate, to the sum of \$32,000" (describing them) and which have been paid as hereinafter stated.

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That to secure them for lending the said notes, "said Mosquera & Co., at about the time of their delivery to them as aforesaid, transferred the said 408 ceroons to said defendants, with authority to sell the same, and also gave to them a letter of consignment of said 438 ceroons, then about to arrive, with like authority to sell the same." "The said defendants further say, that upon the arrival of the said 438 ceroons, as above stated, said Mosquera & Co. obtained the usual custom-house permits for the landing and storing the same, and delivered the same to said defendants, in pursuance of their aforesaid agreement, and that said bark was thereupon sent to one of the public stores for storage, and was there stored for the account, and at the risk of said defendants, and the same has since been, and still is, held in store for said defendants' account, and subject to their order."

Their answer further states, (as to the second advance,) "that on or about the 15th of July, 1856, the said Mosquera & Co. held the usual custom-house permits for other 342 ceroons of bark," . . . "on which permit it was stated, that said bark was imported by Mosquera & Co., from Santa Martha." That, about this date, Mosquera & Co. applied to them for a further loan or advance of \$20,000, upon the security of said 342 ceroons," and upon the further security of 800 other ceroons of bark, which they stated to defendants was then being landed by them, from the vessel in the port of New York." (These 642 ceroons are part of the 1539 in question.)

The defendants, on this application, made a further advance of \$20,000, in notes maturing on the 16th of October, 1856, (and which have been paid, as hereinafter stated,) and to secure them for the loan of such notes, "said Mosquera & Co., at about the time of their delivery to them, transferred and delivered to said defendants said custom-house permit, for the 342 ceroons above mentioned, and consigned to them the said 342 ceroons and 800 ceroons, and gave them authority to sell the same, and agreed to procure the necessary permit to land and store the said 800 ceroons, and to procure all said ceroons to be stored in the name, for the account and subject to the order of said defendants, and after the storage of said ceroons, to obtain and deliver to them the usual warehouse-keeper's receipt therefor," and did, about the 5th of August, 1856, obtain, and deliver to them, a warehouse-keeper's

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receipt, signed by the keepers of the bonded warehouses, Nos. 9 and 11 Bridge street, "for the 438 ceroons, 842 ceroons and 300 ceroons above mentioned," and that all of said ceroons of bark "are now held by these defendants as security for the payment of their advances made thereon."

The answer next alleges, the making of "a new or renewed advance" of notes to the amount of \$31,800, on or about the 2d of September, 1856, upon "the further pledge and security of all the quina or bark which Mosquera & Co. had previously transferred to said defendants, and then held by them;" and after the delivery of "the last-mentioned notes to Mosquera & Co., they were furnished by them with the funds required to meet and pay the said notes for \$32,000 above mentioned; and they are informed, and believe, that the greater part of those funds were realized by said Mosquera & Co., upon the negotiation of the notes, amounting to \$31,800, above mentioned."

The answer next alleges, (as to the third advance,) a further loan or advance, of \$16,400, made on the 6th of September, 1856, to Mosquera & Co., "on the further pledge of all the quina or bark which they had previously transferred to said defendants, and then held by them, among which were 239 ceroons, not hereinbefore particularly specified, 48 ceroons, parcel of said 239 ceroons," being also parcel of the 1539 ceroons in question.

That the said 48 ceroons were transferred to them, with other bark not hereinbefore mentioned, by Mosquera & Co., in April, 1856, as security for a loan of notes to the amount of \$40,000, "said 48 ceroons and other bark having been then transferred and delivered to said defendants by said Mosquera & Co., in pledge, and as security for the repayment of all moneys that said defendants should or might pay, upon or on account of said notes."

They were informed by Mosquera & Co., at the time of such pledge and advance, and then believed, and so state the fact to be, "that said Mosquera & Co. then had said 48 ceroons in possession in store, in the City of New York; that the same were stored in their names, at the risk, and subject to the order of Mosquera & Co., and that the same were owned by them."

That these "48 ceroons were not withdrawn from their possession by said Mosquera & Co., but were left with them until said 6th day of September, 1856, in pledge for further advances of

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notes made by them to Mosquera & Co., at different times prior to said 6th day of September, and on the faith that they were the owners thereof." It also alleges, that these notes, amounting to \$16,400, have been paid, and claims, that the bark is legally pledged for the repayment thereof.

The answer next alleges, the making, on the 16th of September, 1856, of "a new or renewed advance" to Mosquera & Co., to the amount of \$20,000, "on the further pledge or security of all the quina or bark which they had previously transferred to said defendants, and then held by them;" describes such notes, and avers they were paid, and states, "that after the delivery of the last-mentioned notes to Mosquera & Co., they were furnished by them with the funds required to meet and pay the parcel of notes for \$20,000 advanced by them to said Mosquera & Co., on or about the 15th of July, 1856, as above stated;" and states, on information and belief, that funds were obtained by Mosquera & Co., by negotiating the parcel of notes, amounting to \$20,000, "advanced them as aforesaid, on or about the 16th of September, 1856." It also alleges, that the \$20,000 of notes last advanced, have been paid, and claims a lien on the bark for the reimbursement of the same with interest.

Their answer next alleges, (as to the fourth advance,) the making of a further loan or advance of \$10,000, on or about the 18th of September, 1856, "upon the bark they then held, and upon the pledge and security of the same, and 316 other ceroons of quina or bark," 24 of which are parcel of the 1539 in question.

"That, at the time of said application, said defendants were informed by said Mosquera & Co., and they believed, and they now state on information and belief, according to the fact, that said Mosquera & Co. then had in store, in one of the bonded warehouses in the City of New York, said three hundred and sixteen ceroons of bark; and that the same were there stored in their name, at their own risk, and subject to their own order."

That Mosquera & Co., "at or about the time of their delivery to them" (of said notes, to the amount of \$10,000) "as aforesaid, delivered to said defendants a warehouse-keeper's receipt for said 316 ceroons of bark, and consigned said bark to them, with authority to sell the same; and that said bark has, since that time,

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remained stored in the name, at the risk, and subject to the order of these defendants."

That said last-mentioned notes have been paid, and a lien on the bark, by reason of the premises, for the amount of said notes, with interest, is claimed.

Their answer next alleges, (as to the fifth advance,) the making of a further loan or advance of \$5000, on or about the 22d of September, 1856, "upon the bark received from Mosquera & Co., which they then held, and upon the pledge and security thereof, and 150 other ceroons of bark, 51 of which" are also parcel of the 1539 in question.

It states the making of the same representations, by Mosquera & Co., in respect to the 150 ceroons, and the same belief of the defendants of the truth thereof, and in the same form as are above alleged in respect to the 816 ceroons.

It describes the notes, amounting to \$5000, and alleges that "said Mosquera & Co., at about the time of the delivery thereof to them, as aforesaid, made a consignment to said defendants of said 150 ceroons, with authority to sell the same; and authorized said defendants to hold all the bark, which had been previously pledged to them, in pledge, and as security for the repayment of said last-mentioned advance; that said 51 ceroons, part of said 150 ceroons, have, since that time, been and remained stored in one of the bonded warehouses in New York, in the name, at the risk, and subject to the order of said defendants."

The answer does not attempt to state the terms or contents of the "letter of consignment," or of either of the "Custom House permits," or "warehouse receipts," of which it speaks.

The pleadings, which make about 250 folios, contain many other allegations not noticed in this statement, as they are not material to any of the questions decided by the Court, or discussed in its opinion, delivered in support of the decision made upon the order appealed from.

Mr. Justice Hoffman delivered an opinion in support of the order made by him on the 20th of June, 1857, (the order appealed from,) which opinion, after stating the facts of the case, as deduced by him from the pleadings, concludes as follows, viz:—

HOFFMAN, J.—"This statement is sufficiently accurate to raise the material questions in the case.

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"*First.* Have Hitchcock and Reading a right to be subrogated to the claim of Mosquera & Co.?

"*Next.* Have they a right, beyond or independently of that claim, for their own advances to Mosquera & Co.?

"The admitted price of the ceroons is now about \$32 each, which would yield, say \$50,000. If Mosquera & Co. establish their whole account, the proceeds will do no more than pay it. If it is reduced, as claimed, to about \$24,000, then, even if Hitchcock and Reading can be substituted for this amount, they must rest upon different grounds to support their claim for the difference, say \$26,000. (\$50,000 — \$24,000 = \$26,000.)

"Without advertizing to cases at length, as to the rule of the Common Law, it is sufficient to cite that of *Navulshaw v. Brownrigg*, (1 Simons 578, S. C. 7 Eng. L. and Eq., Rep. 106, and 13 Id. 261, upon appeal.) The case was first before Lord Cramworth, as Vice-Chancellor of England, and then before the Lord Chancellor. The latter thus stated the rule of the Common Law:—'The common law was, upon this subject, very strict; for not only could not the factor pledge the goods, however necessary it might be to raise money for the purposes of the principal, so as to give the pledgee the right to retain the produce of them if he sold them, but not even to pay bills drawn upon the original agent, and paid by the pledgee to the credit of the original holder; so that, in point of fact, by the Common Law, there could be no dealing by way of pledge in this country with goods which had been remitted to an agent without an express authority to pledge. To meet that inconvenience, several Acts of Parliament were successively passed. The first of them was the Act of 4 Geo. 4, c. 83. That statute merely gave to the person who took the pledge the right of the person who pledged; so that if the agent had a right as against his principal, that right was communicated to the pledgee and nothing further.' He then states the provisions of 6 Geo. 4, c. 94, and observes:—'That statute enabled the agent, as regarded third persons, to sell or to pledge, provided the persons with whom he pledged did not know that he was not the actual and *bona fide* owner of the property. Although you are dealing with an agent, if you do not know that he has not authority to sell, you are perfectly safe in buying the goods.'

'As the law, therefore, stands, any one may safely buy of an

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agent, if he does not know (and it is absolutely necessary that he should not,) that the agent is not authorized to sell ; and if the person selling is known to be an agent, then the law gives to persons accepting goods in pledge from known agents the interest of the person who makes the pledge.'

"The Lord Chancellor then proceeds to state the provisions of the Statute 5th and 6th Victoria, and to show in what points it extended the operation of the previous statute. The case itself is a striking illustration of the change. The owner resided in India, consigned goods to a merchant in Liverpool, with instructions to sell, and drew upon him a bill, which was accepted. The consignee placed the goods in the hands of his factor, in London, with notice of their having been consigned to him for sale, and this factor accepted a bill of the consignee, which he paid. The consignee failed, leaving his acceptance unpaid ; yet, the right of the London factor was sustained against the owner.

"The cases of *Taylor v. Trueman*, (1 Moody and Malkin, Rep. 453,) of *Thompson v. Farmer*, (*ibid.* 48,) of *Fletcher v. Heath*, (7 Barn. and Cres. Rep. 517,) of *Blandy v. Allen*, (3 Carr. and Payne, Rep. 447,) and *Jackson v. Clark*, (1 Young and Jervis, Rep. 216,) afford expositions of the English statutes prior to that of Victoria, and show the English law upon the present question. They appear to settle the following points :—

"That, to enable the pledgee of a factor, who has a lien, to retain goods or documents up to the extent of the factor's lien, the transfer must have been expressly as a pledge ; that when the question is as to a sale by the factor, to the other party, the fact of actual knowledge, that the vendor was not the owner, was to be inquired into ; knowledge of such fact was unimportant, so far as a right of substitution merely was claimed. The pledgee of a factor for an antecedent debt is liable, in trover, to the owner ; but in estimating the damages, when the goods had been sold, he was entitled to a credit for the amount due by the owner to the factor. The right of the pledgee, whether with or without notice, depended upon the state of the accounts generally between the owner and the factor.

"The rule in our own State, prior to the statute, appears to have been the same, viz. : that the right of pledging for advances was prohibited, either to vest the pledgee with a title to the extent of

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the factor's lien, or beyond it. The lien was not transferable. Change of possession worked its loss, and the party could not hold, in his own right, the transfer as against the owner being wrongful. (Paley on Agency, 229, 230, Am. ed.; Story on Agency, §§ 366-372, p. 408; Kent's Com. vol. ii. p. 625, 3d ed.) 'The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor: for the lien which the factor might have had, for such balance, is personal, and cannot be transferred by his tortious act, in pledging the goods for his own debt.' (Cross on Lien, Law Library.)

"There was (not properly an exception to this rule but) another rule, which prevented the transfer to a depository of goods or documents, by the factor, from affecting his own lien. Such was the case of *McCombie v. Davies*, (7 East., Rep. 5,) and of *Urquhart v. McIver*, (4 John. Rep. 108.) The latter case was especially one of a mere transfer to an assignee, who made no advances, upon the express trust to restore the ship upon payment of the factor's advances. Chief-Judge Kent, in delivering the opinion of the Court, (Spencer and Yates dissenting,) said: 'A factor may deliver possession of the goods, on which he has a lien, to a third person, with notice of the lien, and with a declaration, that the transfer to such person is as agent of the factor, and for his benefit. This is a continuance, in effect, of the factor's possession.'

"In such cases, then, there is not a transfer of the lien to a pledgee available to him, but a transfer of the factor's possession, simply to retain the lien to himself. If the factor had been paid, the pledgee could not have set up his own advance, even to the amount existing at the date of the pledge.

"When, then, Mr. Justice Story, in section 367, (on agency,) says, that an agent having a lien, may lawfully transfer and pledge the same to another person, as a security, to the extent of the amount due himself; and when Chancellor Kent (2 Com. 639) states the rule similarly, the position is either to be understood to be the law, as influenced by the statute, or appears to require some modification.

"It may be, that when all the parties are before the Court, in an equity suit, and an admitted or proven balance is due the factor, by whom goods have been pledged, the pledgee may avail him-

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self of the factor's right, and the relative claims be thus adjusted.

"Is our statute, then, sufficient to support the rule found in the English Acts and cases prior to that of Victoria?

"It was passed in 1830. (2 R. S. 3d ed. p. 59.) It is declared in several cases, to have been framed upon the Acts of George IV. (*Covill v. Hill*, 4 Denio Rep. 329; 2 Seld. 374; *Stevens v. Wilson*,⁶ Hill Rep. 512.)

"And, first, will it bear the construction of allowing a pledgee, with notice of the agency, to be subrogated to the lien of the factor?

"In *Stevens v. Wilson*, when in the Court of Errors, (3 Denio Rep. 473,) the Chancellor said:—'Our statute does not, as in the 5th section of the 6th Geo. IV. ch. 94, authorize the agent or factor to pledge the goods of his principal to the extent of his lien, to persons who are aware of his fiduciary character, and without any authority from his principal for that purpose.'

"In the Supreme Court, (6 Hill Rep. 512,) Bronson, Justice, observes:—'Whether the factor, without any special delegation of authority for that purpose, may pledge the goods to raise money for the benefit of his principal, or whether he may pledge the property to the extent of any lien he may have upon it, are questions which do not arise upon this Bill of Exceptions. Colgate had no lien upon the goods. He was a debtor to the plaintiffs, and he made the advances to the factor, with the knowledge that the plaintiffs were the owners of the property.'

"The case was first tried in this Court, and went to the Supreme Court, on writ of error. Upon the trial, (in 1841,) it appears that the Judge did embrace in his charge, the proposition, that the pledgee could retain against the owner, for the factor's lien, for he told the jury that the statute did not enable him, having knowledge, to retain the goods against the principal, for any advances to the factor, to any amount beyond the right or interest of the factor therein. (See the charge stated at length in the dissenting opinion of Johnson, Senator.) The Chancellor, also, (p. 476,) states this as the result of the charge.

"The case decided, that a party making advances to a consignee, with full knowledge of the fact as to his agency, was not protected by the Act. But the factor himself had no lien.

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"The first section, thus interpreted, amounts to this—that when the agency is known, no sale or disposition for money advanced, or negotiable paper given to the agent, will be available.

"The second section of the English Act, and the third of our own, correspond on the subject matter. They differ in this important particular. By the former, the possession of the documents specified will give validity to a contract with another, for the sale or disposition of the goods, or the deposit or pledge thereof, if the buyer, transferee or pledgee has not notice that the party is not the actual and *bona fide* owner. By the third section of our Act, the words are limited to a sale and disposition, the words deposit or pledge being omitted. Hence, as the case of *Stevens v. Wilson* decides, this section is to be read as if the words, as to notice, in the English Act, were employed; and then we have the case covered of a sale and disposition to one without notice. Yet, it may be well urged, that a pledge to one without notice, is covered by the phrase disposition.

"But the third section of the English Act differs from the fourth corresponding section of our own, in a marked particular. The person who takes goods in pledge for an antecedent debt, without notice of the ownership, acquires the right of the party making the pledge, and no other. The clause, without notice, is omitted in our section. The English fifth section gives the pawnee the right of the factor, even when he has notice, for advances then made on the security. No such section is found in our Act. But the omission of the clause, without notice, in the fourth section, may perhaps justify the argument, that the pledgee, even with notice, for a prior demand, may be substituted in the place of the factor. If so, it would be strange that he should not be substituted for advances, at the time, to a like extent.

"The fifth section of our statute, which corresponds with the sixth section of the English Act, is consistent, at least, with this supposition.

"*Second.*—Leaving this point of the case as not clearly settled, I proceed to the second inquiry, viz.:—whether the defendants Hitchcock & Reading are not entitled to hold the goods on the basis of their own advances, irrespective of the lien of Mosquera & Co.

"The Act contemplates and provides for two cases: one of actual

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possession of goods—the other of the symbolical title to them by possession of documents.

"The case which is made by the defendants, is of the possession of permits of landing, and warehouse-keeper's receipts, and what is termed in the answer, a letter of consignment. Some of the bark was, at the date of the first advance, in store, and it is averred that this was transferred to Hitchcock & Reading.

"The statute enumerates, among the documents of title, bills of lading, custom-house permits, or warehouse-keeper's receipts for the delivery of merchandise. The defendants say that they had a transfer of permits, and storehouse receipts. This seems to me sufficient to constitute a title. The answer is also explicit, as to the defendants' ignorance of the plaintiffs being the owners, and of their belief that Mosquera & Co. were such owners.

"But the case of *Blose v. Holmes*, (2 Moody and Robinson Rep. 22) is referred to by the plaintiffs' counsel, as proving that the possession of the permits and the warehouse receipts, is not sufficient.

That case was an action of trover. The plaintiffs contended that the Act only gave validity to pledges made by a factor of bills of lading, and other documents of that nature evidencing title, and with which the factor may have been intrusted by his principals; all the documents enumerated in the statute were of that description; but here the banking company made the advances on the faith of a mere delivery order in the one case, and of the warehouse-man's acknowledgment in the other; neither of them being instruments with which his principals had intrusted him; but both of them instruments created by the factor himself, for the very purpose of raising money.

"Alderson, Baron left it to the jury to say, whether the banking company, at the time they made the advances, were aware of the fact, that the goods did not belong to Hollingworth, and whether Hollingworth himself had any lien on the argol, which he could transfer to the defendant, under the fifth section of the statute. With regard to the other point, his lordship expressed a clear opinion that the statute gave validity only to pledges by a factor of documents with which the real owner had previously intrusted him; and that it did not extend to the pledge of documents created, (as in the present instance,) by the factor himself.

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He thought it right that the question of fact should be left to the jury; but in the event of their finding that the banking company made the advance in ignorance, that the goods were not the property of Hollingworth, he should still direct the verdict to be entered for the plaintiffs.

"The jury found that the banking company knew that the goods were not the property of Hollingworth, and that Hollingworth had no lien on the argol, and there was consequently a verdict for the plaintiffs.

"I confess I am not able to see the propriety of this decision, at least as applicable to our course of proceeding under foreign consignments and the custom-house regulations.

"The invoices which accompany a shipment, are deposited, and the bill of lading is exhibited, at the custom-house. The possession of the bill of lading enables a consignee to obtain the permit. (Laws U. S., 1799, §§ 23, 24.) The latter becomes the document of title, and the factor is as fully intrusted with this, by the owner, as he is with the bill of lading itself, for the owner enables him to obtain it.

"In my opinion, the defendants, Hitchcock & Reading, appear, upon the case as presented, entitled to the bark.

"The order will be, that the motion be denied, and the *interim* injunction be discharged, upon those defendants entering into an undertaking to keep an account of the sales and disposition of the bark, and to pay over the same to the plaintiffs, or such part thereof, as it may be adjudged they are entitled to."

F. B. Cutting, for plaintiffs and appellants, contended:—

That, at Common Law, Mosquera & Co. had no power to pledge, and by such an act would forfeit the lien they otherwise would have had for the advances made by themselves to the plaintiffs.

That Hitchcock & Reading had not, under any provisions of the N. Y. Factors' Act, acquired any lien upon the bark, or any right to retain it, as against the plaintiffs, the true and actual owners.

That they had not made their alleged advances, upon the faith of Mosquera & Co. being the owners, induced by any of the docu-

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mentary evidence of title, specified in the Act, intrusted to them by the plaintiffs, and by Mosquera & Co. deposited with Hitchcock & Reading.

That the "letter of consignment," the "custom-house permits," and "warehouse-keeper's receipts," spoken of in their answer, were not, and that neither of them was such a document as the Factors' Act makes evidence of ownership, or as will protect a pledgee, or person advancing on the faith of ownership induced thereby, and on the deposit thereof, and that the plaintiffs had not, within the meaning of that Act, intrusted Mosquera & Co. with either of such documents.

That the document must be one which the Act specifies, and that the plaintiff must himself have intrusted his agent with such document, to satisfy the statute.

That Mosquera & Co. had not actual possession of the bark, at the time of the alleged advances: it was then in the legal and actual custody of the Collector of the Port of New York, subject to duties thereon. They could not, as agents, not having the documentary evidence of title to the bark, but intrusted with the possession of the bark for the purpose of sale, make a valid pledge of it. And it was essential to the validity of such a pledge, that the pledgee should, at the time, take actual possession of the goods claimed to be pledged, and this Hitchcock & Reading had not done.

He discussed the cases cited on the written points submitted, on the part of the respondents, Hitchcock & Reading, (which will be found *infra*,) and most of those cited in the opinion of the Court. A reference to them here, as being unnecessary, is omitted.

GEO. N. TITUS and *CHARLES O'CONNOR*, for the respondents, Hitchcock & Reading, submitted and argued the following points, *viz.*:

I. It is a general and fundamental principle of the Common Law, that title to personal property cannot be divested except by the consent of the owner. (*Saltus v. Everett*, 20 Wend. 275.)

II. Certain personal things, by the custom of merchants, which is part of the Common Law, have been endowed with negotiability; so that the *bona fide* receiver, for value, in the ordinary course of trade, acquires a good title. Things which may be

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denominated the currency of trade, are about all that come within this established exception to the general rule. After a great struggle, the well-known muniment representing the ownership, called the bill of lading, was brought within this principle; so that a transfer by the consignee gave to a *bona fide* transferee, etc., a good title to the goods, as against the consignor. (*Lickbarrow v. Mason*, 1 Smith's Leading Cases, 387; see the same point briefly stated by Verplanck, Senator, in 20 Wend., 280, 281.)

III. Another analogous general rule of the Common Law is, that the power of an agent must be shown, in order to render his act binding on his principal. It necessarily resulted from this rule, that an agent, authorized to sell goods on behalf of his principal, could not pledge them. It also resulted, that a pledge by the agent, for his own debt, was a breach of duty on his part; and, as the lien of an agent for his balance, on the goods in his hands, is a special privilege accorded to his class by the favor and indulgence of the law, as a reward for the risks incurred in the faithful performance of his duty, such lien will not be allowed to him who throws off the character of agent, and, by a petty treason toward his principal, assuming to be owner of the goods, converts them to his own personal use.

1. The first modification of the latter somewhat rigorous branch of this rule, in England, was by the first Factors' Act of 1823. It allows (among other things) that the pledgee of an agent (even with notice) shall hold to the extent of the lien of the agent. And the more extensive Factors' Act, passed in 1825, § 5, re-enacted this very equitable doctrine. It has been judicially doubted whether the New York Factors' Act retains this principle. (*Stevens v. Wilson*, 3 Denio, 475-6.) But we submit that notice, and no new advance, are, in judgment of law, precisely the same impediment to the acquisition of a title as *bona fide* purchaser; and, consequently, we claim that the fourth section of the New York Factors' Act adopts this equitable mitigation. (*Judge Hoffman's Opinion*.)

2. The bill acquiesces in this equity, and assents to pay, to whichever defendant may be entitled to it, whatever sum the plaintiffs may be found to owe Mosquera & Co., as a condition of the relief sought; and, even if they were unwilling, a Court of Equity would no doubt impose that very condition.

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IV. Assuming the construction just claimed, and consequently that Hitchcock & Reading are entitled, at least, to the amount due from the plaintiffs to Mosquera & Co., the case made for an injunction is very feeble.

1. The debt due to Mosquera & Co., from the plaintiffs, is very nearly equal to the whole value of the goods.

2. The claim set up to reduce this sum, by the amount of a loss which Mosquera & Co. omitted to cover by insurance, rests, both as to law and fact, upon very dubious premises; and on a careful examination of the facts, the loss would be found not to exceed \$18,000 or \$14,000.

V. The English Factors' Acts are subject to very different considerations from those applicable to the New York Act, and the bearing of the English decisions cannot be appreciated without carefully observing these differences between the legislation of the two countries.

1. The first section of the Act of 6 Geo. IV., ch. xciv., commonly called the Factors' Act, (Dunlap's Paley App., No. 1,) does not differ in the slightest degree from §§ 1 and 2 of the New York Factors' Act of 1830, in point of substance. The former is an average specimen of English verbosity: the latter are framed in the more brief and simple style of American legislation. *a.* The point most worthy of notice about the English Act, in this immediate connection, is, that this first section is limited to the case of goods shipped, and operates only in favor of a consignee advancing on the faith of the consignment. *b.* The brevity of these sections, in the New York Factors' Act, gave rise to a question which could not have arisen under the full and explicit verbiage of the corresponding sections of the English Act. It was erroneously imagined that the mere existence of a bill of lading, no matter though obtained by a thief, would give a consignee a lien for his advances. (*Covill v. Hill*, 4 Denio, 329, 330; S. C. on appeal, 2 Seld. 380.)

2. The third section of the New York Act, is an adoption of the second section of the English Act, with the same studied effort to avoid redundancy in verbiage, and with but one difference in point of substance. That difference, however, is very important. A much litigated question grew out of, and others may arise, from its meagreness of language, as compared with its prototype.

(*a.*) On comparing the sections, it will be observed, that the English section contains an express proviso, (not found in the New

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York Act,) that it shall not operate in favor of one having notice that the agent in possession of the documentary proof of title was not "the actual and *bona fide* owner." (See 8 Denio, 482, where this is observed upon.) The point in *Stevens v. Wilson*, 6 Hill, 514, was, whether the pledgee of a known factor for sale, could hold as against the true owner. The Superior and Supreme Courts held in the negative: thus deciding that the omission of the proviso wrought no consequence; and that, in this respect, the second section of the 6th Geo. IV., ch. xciv., and the third section of the New York Factors' Act, were identical. This case went to the Court of Errors, and was there very fully considered. Chancellor Walworth, with his usual ability and clearness, reviewed the whole subject. Six written opinions and 21 votes were given for affirmance, Senator Johnson alone dissenting. The case throughout turned upon this single point, i. e., the materiality of notice. (8 Denio, 482.)

(b.) This was just exactly such another point as that made on the shipment sections in *Covill v. Hill*. (See, also, 20 Wend. 272, 281, 284.)

(c.) The difference between the two sections, in point of substance, is this: The English Act did not authorize a factor for sale, to make a valid pledge on the strength of a mere possession of the goods. "If," says Lord Denman, delivering judgment in *Hatfield v. Phillips*, (9 Meeson & Welsby, 649,) "they are received into his own (the factor's) warehouse, neither by the Common Law, nor by the statute in question, can he pledge the goods; nor will there be any document indicative of title, which can bring him within the second section of the statute." The English statute was confined to the case of documentary title, intrusted to the factor by the owner. It did not go the length of making possession of the goods themselves a voucher on which third persons might safely act. It was not deemed good policy in England to go so far, at least, by the Judges. They said: "the owner cannot earmark his goods; he may easily earmark the muniments of title with which he entrusts his agent; and, if he chooses, from blind confidence or negligence, to omit that precaution, it is fair that he should bear the loss." The second section of Geo. IV., ch. xciv., as expounded by the English Courts, merely extended to certain other documents the doctrine of *Lickbarrow v. Mason*, 1 Smith's Leading Cases, 387; 43 Law Library. See its point, briefly described by

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Verplanck, Senator, in 20 Wend. 280, 281: "He who trusts his consignee with a bill of lading in ordinary form, gives him the full power of disposition as to *bona fide* dealers with him."

Hence arose the English Point, as it may be called, that where documentary evidence of title, in the factor, is relied upon, by a pledgee, to oust the prior equity of the original owner, in favor of a *bona fide* dealer with the factor, the document must be one, mediately or immediately, emanating from that owner. One which he might have earmarked, had he chosen to employ that precaution. (In Exch., *Hatfield v. Phillips*, 9 M. & W. 647; *Phillips v. Huth*, 6 id. 572; S. C. in House of Lords, A. D. 1845; 14 M. & W. 671; 12 Cl. & Finn. 356.)

(d.) The New York Act, § 3, took a stride far in advance of the English Act, as it was construed by the English Judges. In addition to the case provided for in the English Act, it adds: "and every such factor, or agent, not having the documentary evidence, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as security for any advances to be made or obtained thereon," shall be deemed the true owner.

(e.) The English Judges said, with great propriety, you shall not lodge the goods with your own warehouse-man, and pledge his receipt given to you, because you are not authorized to pledge the goods themselves. But when once authorized to pledge the goods themselves, the power to make, by his own act, the necessary documents of title is, by necessary consequence, vested in the factor, as an incident. (*Jennings v. Merrill*, 20 Wend. 11; per Lott, 3 Denio, 478.)

3. It was an inconveniently rigorous rule, that a factor could not, by taking up a loan, transfer the possession of his principal's goods to the lender, together with his own just and lawful lien upon them, as against the principal, for his general balance. The Acts of Geo. IV. abrogated this rule. Ch. Walworth, in 3 Denio, 473, seems to think it was not wholly abrogated by our statute. He is probably mistaken; but if our legislators have not failed, in that one particular, they have shown much more skill in dealing with this subject than the British Parliament. A very brief review of the several statutes, and the cases, will show, that in one single short Act, our Legislature accomplished all that it took Parliament many years to effect, with their three verbose statutes.

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(1.) The Act of 4 Geo. IV. ch. 83, was passed in 1823. (2.) The Act of 6 Geo. IV. ch. 94, was passed in 1825. It is most probable that Parliament intended, by the 4th section of the latter Act, to give the power of pledging to the agent or factor, who was intrusted with the possession. But after much litigation, as appears by the cases cited, from 6 and 9 Meeson & Welsby, the Court settled it that pledging was not an act in the usual course of business. The latter decision was in 1842. The decision, in 9 Meeson & Welsby, immediately produced the Act of 5 and 6 Victoria; but the party went on and contested the point to the Court of final appeal, where it was decided in the same way, affirming the Exch. Chamber. (14 M. & W. 671; 12 Cl. & Finn. 356.) The Act of 5 and 6 Victoria, ch. 89, enacted, in substance, that pledging, and taking advances, had become a usual course of trade, and placed the English Factors' Law, in this respect, on precisely the same footing on which it had been placed by the Legislature of New York, in 1830. (Dunlop's Paley on Agency, app., No. 2; 9 Meeson & Welsby, Am. ed., 650. Note; *Navulshaw v. Brownrigg*, 7 Eng. L. & Eq. 112; S. C. on appeal, 18 Eng. L. & Eq. 262; St. Leonards Chancellor.)

VI. The inapplicability of the English doctrine, about "intrusting" the agent with documents, to the question now before this Court, is made evident by this review. But inasmuch as it became the absolute duty of Mosquera & Co., immediately upon the arrival of the goods, to enter them, to obtain landing permits, and (paying the duties) to take the goods into their own possession, or to enter them for warehousing, and take the requisite documents, the reasoning of the English cases would make the obtaining of these documents by Mosquera & Co., an act of the plaintiffs, even within the English rule. For *qui facit per alium facit per se*. (9 Statutes at large of United States, p. 53.) 1. It will be seen, that *Phillips v. Huth* was decided by the jury as a question of fact. 2. It was shown, that by the usage and custom of trade, it was not within the factor's duty to obtain the documents on which the pledge was made. He did it of his own motion, to answer his own ends, without the consent of his principal, against his wishes, and, in fact, by a surprise upon him. How totally unlike the present case.

VII. Turning its attention to the facts, the Court will see that

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the plaintiffs had intrusted Mosquera & Co. with the complete control and possession of the goods, and had given them complete authority to take out custom-house permits, etc., and thus to clothe themselves with written evidence of title. It is not a case where Mosquera & Co. had merely an opportunity of wrongfully obtaining possession of a muniment of title. Again, it will be seen, that giving all possible effect to every petty criticism, as to the order of events, Hitchcock & Reading advanced their money on the faith of the apparent title of Mosquera & Co., and without any notice.

There is, consequently, no ground for an injunction.

BY THE COURT. DUER, CH. J.—This is a case of the first impression ; and, from the nature of the questions which it involves, and their bearing upon mercantile transactions, of great importance and frequent occurrence, it may truly be said, that the public, and not merely the parties, have an interest in its decision. We have examined those questions,—such, at least, has been our endeavor—with all the care and attention their novelty and their importance seemed to demand.

The case is before us, upon an appeal, by the plaintiffs, from an order at Special Term, denying a motion for the continuance of a temporary injunction, by which the defendants were restrained from selling, or otherwise disposing of 1539 bales—in commerce, termed ceroons—of quina, or Peruvian bark, of which the plaintiffs claim to be the owners.

It appears from the pleadings, and is not denied, that the plaintiffs, who are merchants at Bogota, in New Grenada, trading under the firm of Bonito & Duque, shipped the merchandise in question at different times, and by different vessels, to the defendants, T. C. & A. Mosquera, merchants in this city, transacting business under the firm of Mosquera & Co., to be sold by them on account of the shippers ; and the complaint avers, and the answers do not deny, that the whole of the 1539 ceroons, in respect to which an injunction is sought, are now in one of the bonded warehouses of this city, subject to the lien of the Government of the United States for the duties chargeable thereon.

Neither the terms of the bills of lading, by which the various shipments were consigned, nor the character and form of the entries made by Mosquera & Co., at the custom-house, appear from

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the pleadings ; and in the absence of contrary proof, we shall, for the purposes of the present appeal, intend that it did not appear on the face of the bills of lading, nor of the custom-house entries, that Mosquera & Co. were not the true and sole owners of all the bark consigned to them.

The complaint admits that Mosquera & Co., by the acceptance and payment of sundry bills of exchange, have made large advances upon the different consignments received by them, but avers, that the account which they have delivered to the plaintiffs is greatly erroneous, and insists, upon grounds fully stated in the complaint, that a deduction of more than \$26,000 ought to be made from the balance which the account rendered alleged to be due.

For reasons that hereafter will be fully explained, it will not be necessary that we shall enter at all into the state of the accounts between Mosquera & Co. and the plaintiffs. It is sufficient, now, to say, that the mere existence between them of an unsettled and disputed account would furnish no reason for denying to the plaintiffs the injunction which they seek, if upon other grounds such an injunction ought to be granted.

The defendant, Tracy, is the general assignee of Mosquera & Co., who became insolvent before the commencement of this suit. He has answered jointly with them ; but although the allegations in this joint answer are material in their bearings upon the transactions between Mosquera & Co. and the plaintiffs, the purposes of the decision we are to pronounce upon this appeal do not require them to be stated. The main facts upon which the plaintiffs found their right to an injunction—namely, that the 1539 ceroons, in respect to which the injunction is sought, were consigned to Mosquera & Co., for sale on account of the plaintiffs, and are now in a bonded warehouse, subject to the payment of duties—are not denied, but distinctly admitted.

The remaining defendants, Hitchcock & Reading, are the members of the mercantile firm of Hitchcock & Reading, and it is the controversy which their answer raises, between them and the plaintiffs, that alone demands our attention. They allege in their answer that the 1539 ceroons in question are in their sole possession, or under their sole control ; and they claim to hold, and to be entitled to hold them, as a security for advances exceeding

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\$60,000, which they aver to have made at different times to Mosquera & Co., upon the faith that they were in truth the owners of the property which they had imported and undertook to pledge. Whether, upon the facts set forth in their answer, the title of Hitchcock & Reading as pledgees, can be sustained in opposition to the rights of the plaintiffs as owners, is the question that we are required to determine.

If the determination of this question rested upon the rules of the common law, it would be wholly free from difficulty. It would be our duty, at once, to say that the defence set up cannot be maintained. By the undoubted rules of the common law, a factor, to whom goods are consigned for sale, has no authority to pledge them; and whatever advances he may have made to his principal, and even when the moneys raised by him are applied to the use of his principal, if without an express authority he pledges, as owner, the goods or the documents of title intrusted to him, he is guilty in judgment of law of a violation of his trust; and his act, as tortious and void, passes no title, and can create no lien. On the contrary, it gives to the owner an immediate right of action for the recovery of the goods, or their value, against the innocent pledgee, who was not allowed either to bar a recovery or reduce its amount by any inquiry into the state of the accounts between the plaintiff and his unfaithful agent. (1 M. & Sel. 140; id. 484; 3 B. & Cres. 342; 5 Term Rep. 604; 6 M. & Sel. 1; id. 14; 2 B. & Bing. 639; Park B. in *Phillips v. Huth*, 6 Mees. & Wels. 596; 14 Johns. 129; 20 Johns. 421; 26 Wendell, 467; *Walther v. Wetmore*, 1 E. D. Smith, pp. 24, 25; Opin. Woodruff, Justice.)

It was because these unbending rules of the common law, in their practical operation, were found or deemed to be oppressive and unjust, that in England the several Acts of Parliament were passed, which are particularly referred to in the opinion of our brother, by whom this case was decided at Special Term. (4 Geo. IV., c. 83; 6 Geo. IV., c. 94; 5 & 6 Victoria, c. 39.)

It was with the intention of extending a similar protection, to persons dealing in good faith with apparent owners, that our own Legislature, in 1830, passed the Act—commonly called the “Factors’ Act,”—“for the amendment of the law relative to principals and factors or agents,” (Sess. Laws, 1830, c. 179, 1 R. S., 2d ed.,

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p. 762;) and it is by the provisions of this statute, reasonably interpreted, and in their just application to the facts, as set forth in the answer of the defendants, that in forming our decision we must be governed.

The allegations on the part of the defendants, Hitchcock & Reading, are, that the several contracts under which they made their advances to Mosquera & Co., although void at common law, were rendered valid by the provisions of the third section of the statute, and that should it otherwise be held, they are at least entitled to a lien under the fourth section to the extent of the balance due from the plaintiffs to Mosquera & Co.

In proceeding to inquire whether these allegations can be sustained, we shall give, in the first place, a full exposition of the third section of the statute, as we understand, and after much consideration must construe, its provisions; and we shall then apply our exposition of the statute to the facts of the case, as we collect them from the answers of the defendants.

We shall also incidentally state our views as to the proper construction and application of the fourth section of the statute; but whether Hitchcock & Reading, under that section, and upon the supposition that their defence cannot be sustained under the third, or upon any other grounds, may be subrogated to the rights and remedies, as against the plaintiffs, of Mosquera & Co., is a question that, for reasons hereafter to be explained, it will not be necessary to determine. It will be seen, that it cannot now be so determined as to affect the present rights of the plaintiffs to an injunction.

First.—The important third section, not a phrase or word in which can with propriety be omitted, reads as follows:—

“ § 3. Every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable

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instrument or other obligation, in writing, given by such other person upon the faith thereof."

It is evident, upon a slight consideration, that the words of this section, literally construed, have failed to express the full intention of the Legislature, and that, in order to carry that intention into effect, there are certain omissions which a reasonable construction must supply. If, for example, we look merely at the words of the section, it is sufficient to give validity to a contract made by an agent for the sale or other disposition of merchandise described in a bill of lading, that the bill is in his actual possession when the contract is made, and that the person advancing money upon the contract shall believe, no matter upon what evidence, that the agent is the owner of the goods. It is not, in terms, required that the bill of lading shall have been intrusted to the agent by the owner of the goods, nor that it shall appear upon its face, that the agent is, or may be the owner, nor that it shall be transferred, or even shown to the person making the advance; and the words of the section are just as applicable to an executory contract for the delivery of the goods on a future day as to an immediate sale, deposit or pledge. It is certain, however, that the provisions of the section, if thus construed, would afford facilities and give effect to frauds which it is impossible to believe that the Legislature meant to sanction. They would enable a faithless agent not only to defraud the true owner of the goods, but, by a prior contract, to divest the title of a subsequent *bona fide* purchaser, although to such purchaser the documentary evidence of title may have been transferred or the possession of the goods have been actually delivered, and all this in favor of a person, who, in advancing his money or credit, trusted only to the verbal assurances of the agent, unsupported by any evidence of his title or possession. There can be no hazard in saying that a construction leading to these consequences was not, and could not have been intended, by the English Parliament or by our own Legislature.

In all the adjudged cases to which I shall hereafter refer, a literal construction of the statute—I speak of the English as well as our own—is expressly or impliedly rejected; nor has it been contended that such a construction ought now to be followed. It is not denied, that there are some restrictions which, in order to

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carry into effect the undoubted intentions of the Legislature, must be imposed upon the generality of the terms employed. Guided, therefore, by the prior decisions, and by our own reflections, I shall proceed to explain the provisions in the third section of the Act in conformity to that which, although imperfectly expressed, we fully believe to have been the true and sole intention of the framers of the law, and of the Legislature by which it was enacted.

This important section is not merely founded on, but, with some variations, is an exact transcript of the second section in the English statute, (6 Geo. IV., c. 94.*). The variations are however material, and for several reasons require to be noted.

The English statute does not mention a custom-house permit as a document of title, and it enumerates, as such, several instruments, which, in our own Act, are omitted. The clause in our own Act beginning, "And every such factor," etc., and ending with the words, "obtained thereon," is not found in the English statute, which confines the protection, which it gives, to those who contract with the agent, "upon the faith of the several documents, or either of them," before enumerated.

In the 2d section of the English statute, the words, "for the sale, or disposition of any such goods wares, or merchandise, or any

* 6 Geo. IV. c. 94, Section 2d.—"And be it further enacted, That, from and after the first day of October, one thousand eight hundred and twenty-six, any person or persons intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandise described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted, and in possession as aforesaid, with any person or persons, body, or bodies politic or corporate, for the sale or disposition of the said goods, wares and merchandise, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body, or bodies politic or corporate, upon the faith of such several documents, or either of them; provided such person or persons, body, or bodies politic or corporate, shall not have notice by such documents, or either of them, or otherwise, that such person or persons so intrusted as aforesaid, is or are not the actual and *bona fide* owner or owners, proprietor or proprietors, of such goods, wares, or merchandise, so sold or deposited or pledged as aforesaid; any law, usage, or custom to the contrary thereof in anywise notwithstanding."

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part thereof," are followed by these: "or, for the deposit or pledge thereof, or any part thereof, as a security;" and why these significant words were omitted in our own Act, it is not easy to understand. The omission would seem to render it questionable whether a contract of deposit or pledge, as a security for advances, was meant to be protected, so as to exempt such a transaction from the operation of the rules of the common law; but we are satisfied, upon reflection, that it was not intended that this effect should be given to the omission, and that it ought not to be construed as varying the construction of the Act, so as to deprive a depositary, or pledgee, of the benefit of its provisions. We are persuaded that, by a different construction, we should defeat what must have been, and, in all the cases, is considered as having been, the main purpose of the Act, namely, to give validity to contracts which the rules of the common law wholly prohibited. The words, "for any money, or negotiable instrument given or advanced," which our Act retains, have a sole reference in the English statute to a deposit or pledge of the goods, and it is only to such a contract that they seem to be properly applicable; and whatever doubts might otherwise be entertained as to their proper application, we think, are removed by the 7th section of the Act, the words of which, by a necessary implication, admit the validity of a deposit made by a factor or agent, of any merchandise or document of title intrusted to him, as a security for any money or negotiable instrument borrowed or received by him. I add, that in all the cases in our own Courts, to which I shall hereafter refer, the validity of a pledge made by a factor to a person believing him to be the owner, is admitted both by the counsel and by the Judges. The word "disposition" is certainly broad enough to embrace the contract, and we hold that it is, in its broadest sense, that it must be construed; although it cannot be denied, that in England a far more limited interpretation has been given to it. (*Taylor v. Kymer*, 3 B. & Ad. Rep. 320; Russell on Factors, p. 126, Law Lib. Ed. pp. 88, 89.)

There is another omission in our Act, which it is proper, briefly, to notice. The corresponding section in the English statute concludes with a proviso, that the person contracting with an agent shall not have notice by the documents of title, or otherwise, that such agent is not the owner of the merchandise which he sells or

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pledges. In other words, that the contract shall be void, where such notice is proved. In our opinion, the omission of this is immaterial, since we hold it to be certain, that, in reality, it expresses no more than, in its absence, the law would imply; and such we consider to have been the decision of this Court in *Zachrisson v. Ahman*, (2 Sand. S. C. R. 68,) and of the Supreme Court, and of the Court of Errors, in *Stevens v. Wilson*, (6 Hill, R. 512; S. C., 3 Denio R. 472.)

There are no cases in our own reports, that, by fixing in some degree the construction of the Factors' Act, throw any light upon the questions we are to determine, except those that I have last cited, and that of *Covill v. Hill*, (4 Denio R. 327; S. C., 2 Selden R. 374;) and, before I proceed further, it will be expedient to state more particularly the import and extent of those decisions. There are, at least, one or two questions which we regard them as having definitively settled.

Stevens v. Wilson, et al., (6 Hill Rep. 512,) came before the Supreme Court upon a writ of error, upon a judgment of this Court, in favor of the plaintiffs. The action was replevin, and was brought for the recovery of a quantity of feathers, which the plaintiffs had consigned to one Colfax, a commission merchant in this city, for sale on their account. Colfax had placed the feathers in the hands of the defendant, Stevens, for the same purpose, and had received from him an advance of about \$3000. But Stevens knew, when he made the advance; that the plaintiffs were the owners of the property, and Colfax merely their factor for its sale. The case turned entirely upon the construction to be given to the last words in the 3d section of the statute, "on the faith thereof." The contention on the part of the defendant was, that these words referred to the word "merchandise," as their last antecedent, and consequently that every person is protected by the statute, who makes advances to a factor upon an actual deposit or pledge of merchandise, even when he knows that the factor is not the owner, and has merely an authority to sell. But the Court rejected this construction, as highly unreasonable and tending to legalize fraud; and, in delivering its judgment, Bronson, Justice, said, that "although in strict grammatical construction, the words 'on the faith thereof,'" might refer to merchandise as the last antecedent, yet, in good sense, as well as sound morals, the reference was to the pre-

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vious words, ‘shall be deemed to be the true owner thereof;’ and he added, that “the obvious meaning of the statute is, that the factor or other agent, who has been intrusted with certain documentary evidence of title, or with the possession and ostensible ownership of the property, shall be deemed the true owner thereof, so far as may be necessary to protect those who have dealt with him upon the faith thereof, that is, the faith induced by the usual *indicia* of title, that he was the true owner of the property.” The judgment of the Supreme Court in favor of the defendants in error, the plaintiffs in the action, was subsequently affirmed in the Court of Errors; and a learned senator, who gave a lucid opinion in favor of its affirmance, adopting substantially the views of Mr. Justice Bronson, said that “full effect and operation can be given to the law, and to the terms ‘on the faith thereof,’ by protecting those who *bona fide* contract with a factor or agent, as owner, on the faith of the possession of the goods intrusted to him, or of the documentary evidence of title specified in the Act.” (Opinion, Lott, Senator, 3 Denio R. 479, 480.)

Zachrisson v. Ahman, (2 Sandf. S. C. R.) 68, merits particular attention; for, as a deliberate judgment of this Court, we, as successors of the eminent Judges by whom it was pronounced, are certainly bound by its authority, and should so hold, even had we entertained serious doubts as to the propriety of the decision. We are not, however, to be understood as intimating that the propriety of the decision, although it is plainly inconsistent with a literal and grammatical construction of the statute, is to our minds at all doubtful.

The action was replevin for the recovery of 221 bales of cotton, and for the bills of lading issued therefor. The plaintiff was a Swedish merchant, transacting business in this city, and his title as owner was clearly established, as it was proved that the cotton had been purchased and shipped on his account, on a voyage from this port to Gothenburg, in Sweden, by one T. Wissman, who, during the absence of the plaintiff, under a mercantile procuration and power of attorney, had the general charge of his affairs. The chief agent, however, in the purchase and shipment of the cotton, was one Suber, a clerk of Wissman, but who, in a modified sense, and subject to the direction and control of Wissman, was an agent

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of the plaintiff in making the purchase. Suber procured the bills of lading to be filled up in the name of the defendant, and deposited them with him as a security for a loan of \$6000, stating that he meant to use the moneys so borrowed for the benefit of the plaintiff, in the payment for cotton before purchased. The representation was false, and the money was fraudulently applied by Suber to his own use, and his employer, Wissman, upon the discovery of the fraud, and before the commencement of the action, demanded the bills of lading from the defendant, who refused to deliver them up. It was insisted, on behalf of the defendant, upon the trial, and at the General Term, that Suber was the general commercial agent of the plaintiff, and, as such, was authorized to pledge the property for the advances made by the defendant; and that, at any rate, Suber was intrusted, as agent, with the possession of the bills of lading, and that his contract, pledging the bills to the defendant for the advances made to him, was therefore valid, and a bar to the plaintiff's recovery, under the provisions of the Act of 1830.

Our late Chief-Justice delivered the opinion of the Court, which was, that upon neither ground could the defence be sustained; that the instructions to Suber afforded no pretence for ascribing to him the authority of a general commercial agent of the plaintiff, nor were any acts of Suber proved, from which the defendant could be warranted to infer that he possessed such authority; that the defence, under the statute, was also plainly untenable. Suber was not a factor in any sense of the term; he was not an agent for the sale of the property. He had no control of the cotton, nor were the bills of lading intrusted to him for the purpose of giving him such control. It was merely as a clerk that he had obtained and held them; and finally, that had Suber been a factor, the defendant would not have been entitled to hold the cotton for his advances, since he knew, or ought to have known, that the plaintiff and not Suber was the owner, and that the case of *Stevens v. Wilson* had settled the law, that it is only when advances are made on the faith of the ownership of the property that a pledgee is protected by the statute. Judgment was therefore rendered for the plaintiff for the full value of the cotton.

The latest and most important case is *Covill v. Hill*, which was

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decided by the Court of Appeals in 1852, and is fully reported in 2 Selden R. 374.

The action was trover, to recover the value of a large quantity of lumber which the plaintiff had contracted to sell to one B. A. Potter, and had agreed should be consigned to the defendants, merchants at Albany. By the terms of the contract between the plaintiff and Potter, it was provided that the plaintiff should hold the title and possession of the lumber until he should be paid the full amount of the purchase money, with interest, and that Potter, as the agent, and in the name of the plaintiff, should ship the lumber to the defendants, Potter paying the freight, to be sold by them as the property of the plaintiff. The lumber was shipped to Albany in a canal boat, and the master signed and delivered to the plaintiff a bill of lading, stating that he had received the lumber for him, and that it was to be delivered to the defendants, at Albany, in good order. Potter paid to the master \$100 on account of the freight, and gave him an order on the defendants for the payment of the residue. The following paper was also delivered to the master:—

"Elmira, July 2d, 1842. Shipped on board Occidental, H. Banks, master, 48,750 feet white-pine boards and plank, for Albany. A. F. Potter."

The person who signed the paper was the son of B. A. Potter, and acted as his agent in shipping the lumber.

It did not appear that the plaintiff had transmitted his bill of lading to the defendants; but on the 16th of July, the lumber, together with the paper signed "A. F. Potter," was delivered to them at Albany, and, in answer to an inquiry as to the ownership, they were informed that it was "the Covill lumber." They paid the balance of the freight, and sent to Potter their acceptance, which they paid at maturity, for \$250, as an advance upon the lumber.

After the lumber had arrived at Albany, an agent of the plaintiff called on the defendants, and informed them that it belonged to the plaintiff, and had been forwarded to them to be sold for him, and he also stated to them the contents of the contract under which it was forwarded. They denied that the lumber belonged to the plaintiff, and asserted that they had received it as Potter's, and had applied it to his use, averring that he was then indebted

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to them for advances in more than \$5000. Subsequently, and before the commencement of the suit, the plaintiff, by an agent, again demanded the lumber from the defendants, and offered to pay their charges, but not their advances. They refused to deliver it, unless their advances to Potter on account of it were also paid; and they proved on the trial that their advances to Potter, on account of lumber which he had shipped to them at various times, exceeded, by more than \$5000, the value of all they had received. The jury, under the instructions of the Judge on the trial, found a verdict for the plaintiff for the value of the lumber at Albany, deducting freight, and a small payment that had been made to the plaintiff by Potter. The Supreme Court denied a motion for a new trial, founded on a bill of exceptions, and the defendants appealed from the judgment.

The positions taken by the counsel for the defendants were, that the plaintiff was not the owner of the lumber, under the contract with Potter, and that if he was so, the defendants were still entitled to retain the lumber, as a security for their advances, under the provisions of the Act relative to principals and factors; but the Court of Appeals overruled all the grounds of defence that were relied on, and by a unanimous vote affirmed the judgment.

Gridley, J., who delivered the opinion of the Court, after showing that the plaintiff was the sole owner of the lumber, remarked, that the paper signed by A. F. Potter was not, in any of its features, a bill of lading, and had no transferable quality as such, and that, could it be regarded as a good bill of lading, it was exposed to the fatal charge of being manufactured in fraud of the plaintiff's rights, and that the defendants, for this reason, and also because they had sufficient notice to put them upon inquiry, of the true ownership of the lumber, were not within the 1st and 2d sections of the Factors' Act, and they were not within the 3d, because the plaintiff, the true owner, had never intrusted Potter with a bill of lading, nor with the possession of the lumber for sale, or as a security for advances to be made thereon; and to show the necessity of such an intrusting, the learned Judge referred to the leading cases in Meeson & Welsby, which, in the progress of this opinion, will be fully stated and explained. (6 Mees. & Wels. R. 572; 9 id. 647.)

It appears to us, that the conclusions to be drawn from the

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decisions in our own Courts that have now been quoted, are, not only that a contract with a factor, to be valid under the provisions of the statute, must be founded on the faith of his ownership of the goods to which it relates, but that this faith must be induced and justified by the documentary evidence of title, specified in the Act, or where no such evidence exists, by the factor's actual possession of the property; and that in all cases, where the protection of the Act is claimed, it must appear that the documentary evidence of possession, which is relied on, was intrusted to the factor by the owner of the property, and not procured or obtained by a wrongful or unauthorized act of the agent. These conclusions, however, by no means embrace all the questions that arise in the case before us; and to enable us to determine those that remain, a more exact and critical examination of the provisions of the statute seems to be necessary.

The contracts with a factor, which, although void at common law, are rendered valid by the provisions in the third statute, belong to two classes. 1st. Where the transaction is founded on the documentary evidence of title mentioned in the Act; and 2d. Where it rests exclusively on the factor's possession of the goods, that possession being the sole evidence of his ownership: and these classes, for obvious reasons, require to be separately considered.

I. As to the first. The documents of title specified in the Act are, 1st, a bill of lading; 2d, a custom-house permit; and 3d a warehouse-keeper's receipt for the delivery of any such merchandise, that is, the merchandise described in the 1st and 2d sections, as shipped from some other port, foreign or domestic. It is perhaps doubtful whether the words "for the delivery," etc., ought not to be construed as referring to each of the documents, but this is a question which it is unnecessary to determine.

We begin with these observations, that in our judgment, to render a contract with a factor, made on the faith of either of these documents valid, as against the owner of the merchandise, it must either appear, on the face of the document, that the factor is the owner, or the terms of the instrument must be entirely consistent with the supposition that he is so; that the document must not merely be exhibited, but must be transferred and delivered to the person advancing his money or credit, in reliance on the evidence

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of ownership which it furnishes; and that the effect of this transfer must be, either to vest in such person the title to the property, or the exclusive right or means of obtaining the actual possession.

I shall proceed to illustrate the truth of these observations, in reference to each of the documents; and shall also explain the true character of each, and in what sense, and under what circumstances, each may be regarded as evidence of ownership.

The truth of our first observation is too manifest for denial. We have already seen, that when a person, who advances his money or credit to a factor, has notice, actual or constructive, that the latter is not the owner of the goods, to which the contract relates, the transaction is a fraud upon the rights of the owner, which it is certain the Legislature never meant to legalize, and no notice can be more direct than that which is furnished by the terms of the document, from which alone the factor derives his authority; which alone gives him any control or power of disposition.

I. A bill of lading is a written acknowledgment by the master of a vessel that he has received the goods which it describes, from a person named as the shipper, to be transported, upon the terms expressed, to their port of destination, and to be there delivered, either to a person named as consignee, or to the order of the shipper, the consignor. (Abbott on Ship., Story & Perkins, 5 ed., p. 323.)

If the bill names the person, whether consignor or consignee, on whose account and risk the goods are shipped, the statement is equivalent to a declaration that the person so named is the real owner. If there is no such statement, the consignee named is presumptively the owner, and he is so, where the goods are deliverable to the order of the shipper, if the bill of lading in his possession is endorsed specially or generally by the shipper. But if, in this last case, the bill of lading in the possession of a factor, or other agent, is not endorsed by the shipper, so far from being evidence of the ownership of the factor, it is no evidence that he has any power to dispose of the goods at all; as under such a bill he has no right to receive the goods on their arrival, he can have no right to dispose of them in the interval. (Abbott, 529.)

When a contract with a factor is founded on a bill of lading,

which either declares, or is consistent with the supposition that he is the owner, we hold it to be certain, that to render the contract, if void at common law, valid under the statute, as against the owner, the bill of lading must be transferred to, or deposited with, the purchaser or pledgee. The words in the English statute, "on the faith of such documents or either of them," have in all the adjudged cases received this interpretation; and although the words in our own statute are somewhat different, we do not doubt that, in order to give effect to the intentions of our Legislature, the same interpretation ought to be given to them. If the factor retains the possession of the bill of lading, and then sells the goods, and transfers the bills to a *bona fide* purchaser, it would be most unreasonable to suppose that the Legislature intended that the legal rights of such a vendee should be defeated by a prior executory contract; and if the prior contract would be void, as against a subsequent vendee, it seems to us a necessary conclusion, that it would be equally so against the owner. The statute makes no distinction; the contract which it renders valid is so against the world.

The provisions in the 7th section of our statute, as we have before intimated, and cannot but think, place the intentions of our Legislature beyond a reasonable doubt. Those provisions make it a criminal offence, punishable by fine and imprisonment, in a factor or other agent, to deposit any document of title intrusted to him as a security for any money borrowed, or negotiable instrument received by him, and to apply or dispose of the same to his own use. Had it been supposed that, under the provisions of the third section, it would be in the power of a factor, or other agent, to commit the same fraud upon his principal, without depositing, as a security, the document intrusted to him, as the offence would have been just as criminal in its nature, and just as much to be apprehended, it seems to us manifest that its commission would have been guarded against, by rendering it liable to the same punishment. It remains to observe, that at common law, a factor for sale, even when, upon the face of a bill of lading, he was the presumptive owner, had no more right to pledge a bill of lading, as a security for advances, than to pledge the goods themselves after their arrival. (1 M. & Sel. 140; 6 id. p. 1; Abbott on Ship. 541, 61.) It is this disability of the fac-

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tor that the statute removes, but removes it by enabling him to pledge the bill to a person believing him to be the owner, and by that immediate delivery which is essential to a pledge, not by contracting to deliver it on a future day.

As the observations that have now been made, as to the necessity of a transfer of a bill of lading, to render a contract, founded on its possession, by a factor, valid, under the statute, are just as applicable to the other specified documents of title, they will not be repeated. In respect to each, a transfer is plainly necessary to pass a title, or give an exclusive right of possession.

A contract, founded on a transfer of the bill of lading, can only be valid when made before the arrival and landing of the goods at their port of destination. After such arrival and landing, the bill of lading is "*functus officio.*" (Russell on Factors, 132, 9 Mees. & Wells, 647,) and unless the goods pass into the actual possession of the factor, it is upon some other document of title that a contract with him, entitled to the protection of the statute, must be founded.

II. The next document mentioned in the Act is, "a custom-house permit," and in relation to this, it is material to observe, and necessary to be borne in mind, that when the Act was passed, (1830,) the only permit known to the law, was that which was granted to a consignee, when the goods mentioned in his invoice and bill of lading, had been duly entered at the custom-house, and the duties thereon paid or secured to be paid; and whether the provisions of the Act, having regard to the intentions of the Legislature in its passage, can be reasonably applied to any other form of permit, (that form being still in use, when the duties are in fact paid,) is one of the questions that it will be necessary to determine.

When a vessel with a cargo arrives from a foreign port, an officer of the customs, an inspector, is immediately placed on board, whose duty it is to prevent the removal of any part of the cargo until a regular permit for its landing, directed to him, has been obtained and delivered. This permit is a paper directed to the inspector, and signed by the collector and naval officer of the port; and when the duties have been paid or secured, the following is its form in blank:—"We certify that A. B. (the importer or consignee,) has paid, or secured to be paid, the duties on the

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merchandise contained in the following packages, in conformity to the entry thereof of this date; which merchandise was imported in (blank for name of vessel and name of master), from (blank for port of departure), permission is hereby given to land the same, viz.: (blank for description of packages)." Such a permit may be justly regarded as *prima facie* evidence that the person named, as having paid the duties, is the owner of the merchandise, and by its fair interpretation, that it is to him that the permission to land the same is given; but it is not like a bill of lading transferable by its terms, nor is it necessary to hold, that its transfer, for value, like that of a bill of lading, would pass a legal title to the assignee. Still, as it is only by the production of the permit, to the inspector, that the landing and possession of the merchandise to which it relates can be obtained, the transfer of such a document, by a delivery order from the consignee, would seem to be an effectual security for any advance made upon its faith, since it would give to the holder, exclusively, the means and power of obtaining the possession of the property meant to be pledged, and would be a bar to any disposition of it by the factor to any other person.

Hence, although a custom-house permit is not enumerated, in English statute, as a document of title, it seems, with entire propriety, to have been inserted as such in our own, taking into consideration the meaning and effect of such a permit, when the Act was passed.

It by no means follows, however, that the same meaning and effect can be attributed to a permit for the landing of merchandise of which an entry has been duly made, but on which the duties are unpaid, and consequently, where the permit, instead of authorizing a delivery of the merchandise to the consignee, directs its removal, for safe keeping, to a public or bonded warehouse. To enable us to determine whether such a permit is a document of title, within the meaning of the statute—a document which may be so pledged as to prejudice the rights of the owner to the possession or recovery of the merchandise; a reference to some of the provisions in the Acts of Congress, establishing the warehouse system, and in the regulations of the Treasury under those Acts, is indispensable.

The first of these Acts was passed August 6, 1846, (United

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States Statutes at Large, vol. 9, p. 53.) It enacted, as a general rule, that all duties on imported goods or merchandise should thereafter be paid in cash; but provided, that in all cases of failure or neglect to pay the duties, the collector should take possession of the goods and deposit the same in one of the public stores, or in a store to be agreed on between him and the owner, importer or consignee, there to be kept with due care, at the charge and risk of such owner, and subject to his order, upon payment of the proper duties and expenses. It then provides for ascertaining the duties, and for securing the same by a bond in double their amount, with sureties to the satisfaction of the collector. This Act was amended by the Act establishing private bonded warehouses, passed 28th March, 1854, (United States Statutes at Large, vol. 10, p. 270,) which gives to the owner the option of having the goods deposited at his expense and risk, either in a public warehouse of the United States, or in a private warehouse used solely for such storage, and approved by the Secretary of the Treasury; and declares, that every such warehouse shall be placed in charge of a proper officer of the customs, who, together with the proprietor, shall have the joint custody of all the merchandise stored therein. Each of the acts authorized the Secretary of the Treasury to establish, from time to time, such rules and regulations, for its due execution, as he may deem to be expedient.

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434, 435.) It remains only to add, that the regulations also provide, that the importer shall exercise the option given to him by law, by designating, upon his entry of the merchandise, the warehouse in which he desires that the same shall be deposited.

It seems manifest, from this statement, that there is very little analogy between a warehouse permit, as it is termed, and that which is given to an importer who has paid the duties; and that nearly all the reasons that have been given for considering the latter a document of title within the provisions of the statute, are wholly inapplicable to the former. It is plainly not necessary that a warehouse permit should be delivered to the importer at all, and if delivered to him, he would hold it with no other power or trust, than that of an ordinary messenger; namely, that of placing it without delay in the hands of the inspector. The temporary possession would give him no control of the goods, that he would not otherwise possess, and no means of reducing them into his possession, nor is any agency of his required in their landing or transportation, since the whole duty of sending them to the warehouse, is cast upon the inspector. When the importer has made the necessary entry, and has executed the necessary bond, and has designated, upon the entry, the warehouse to which he desires the goods to be sent, he has done all that, until the duties are paid; the law requires or empowers him to do.

It would be absurd to suppose, that under the provisions of the statute, a factor or agent may make a contract that can operate to create a valid pledge of a document of title or of the goods to which it relates, if a similar contract made by the owner himself, would, for the like purpose, be ineffectual and void. Should the owner and importer of merchandise, having in his possession a warehouse permit, desire to borrow money upon the faith of his ownership, we hold it to be manifest and certain, that the mere delivery of the permit, no matter by what order accompanied, would afford no security whatever to the lender. It would neither convey to him a title to the goods, nor the right of possession, nor the means of obtaining possession. All that the lender could do, would be to deliver the permit to the inspector, to enable him to perform the duty of removing the goods to the designated store. The goods when stored, and so long as they remained in store, would be in the actual possession of the collec-

tor, subject to the order of the importer, and to his alone, upon the payment of duties and expenses; and upon well-settled principles of law, it would be in the power of the owner, by making the requisite payment, to give to a *bona fide* purchaser the immediate possession and an absolute title. We apprehend that the pretence of a prior lien, as created by the transient possession of the warehouse permit, would, in any Court of Justice, be scouted as plainly illegal and bordering on absurdity.

We state with confidence, that there are only two modes by which a valid pledge of goods of any description can be effected. If the goods are in the actual possession of the owner, that possession must be transferred to the pledgee. If the possession of the owner is merely constructive, the pledge can only be effected by the transfer of such a document as will enable the pledgee, with certainty, at the proper time, to reduce the goods into his own possession, and in the mean time prevent any other person from acquiring legally a hostile possession. Nor can we doubt, that, broad as are the provisions of the statute, the validity of a pledge which a factor attempts to create, must be determined by the same rules.

III. Let us, then, apply these rules to the next and last document of title mentioned in the statute, "a warehouse-keeper's receipt," which, as the law stood when the Act was passed, could only have meant the receipt of the keeper of a private warehouse in which the person named in the receipt has deposited the goods for safe keeping; and applying the words to the case of a consignee or factor, could only mean the receipt of the keeper of the warehouse in which, after the goods have been landed and the duties paid, the factor has elected to place them until he effects a sale. We thus see how exactly the several documents mentioned in the Act correspond with the successive stages of the transaction by which the merchandise is to be placed at the disposition of the factor to whom it is consigned; and in each stage of which, as his possession is merely constructive, some documentary evidence of his title or authority to make a disposition must be produced. We thus have the bill of lading, before the arrival of the goods; the custom-house permit after their arrival, and before they are landed; the warehouse-keeper's receipt when, having been landed, they are placed in the store of a third person.

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It would be a serious mistake, to suppose that the receipt to which the statute refers is a bare acknowledgment, by the keeper of the warehouse, that he has received the goods described from the person named. The transfer of such a receipt, it is obvious, would afford no better security, and no more operate to create a valid pledge, than the transfer of a warehouse permit.

By the very words of the statute, the receipt is to be "for the delivery of the merchandise,"—meaning, as we understand the words, a receipt binding the keeper of the warehouse to deliver the merchandise, upon the surrender of the receipt, to the order of the person from whom he acknowledges to have received it; in other words, to deliver the merchandise to the holder of the receipt, if duly endorsed to him. The transfer of such a receipt has long been considered by merchants, both in England and in the United States, whether justly or not it is needless to inquire, as transferring the property and, constructively, the possession of the merchandise to which it relates; and hence, it is enumerated as a document of title in the English statute as well as our own. There seems no reason to doubt that the transfer of such a receipt, to a person making an advance to a factor, on the faith of his ownership, would give him a valid security within the provisions of the statute, and a just application of the rules that have been stated. It would enable him at once to reduce the goods into his own possession, or, if he so elected, by surrendering the old, to obtain from the keeper of the warehouse a new receipt of the same tenor in his own name and favor. His lien thus perfected, no subsequent act of the factor could displace.

But the remarks that have been made are only applicable to the receipt contemplated by the Legislature; a receipt by the keeper of a private warehouse, in which the importer has himself deposited the merchandise it describes. When the goods are deposited in a bonded warehouse, whether public or private, neither the Acts of Congress, nor the regulations of the Treasury contain any provision by which an authority is given to the collector, or an officer of the customs in charge of a warehouse, or the proprietor of a warehouse, to issue a receipt or certificate of the like character, and to which the same effect may be attributed.

So long as the goods remain in the warehouse, we have already seen, they stand in the name, and are subject, alone, to the order

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of the importer—the payment of the duties and charges being a condition precedent to the exercise of his power; nor is there any provision by which, during this period, his constructive possession can be altered, nor consequently, his power of disposition be legally affected.

It is true, that when the goods are in a warehouse belonging to the Government, the regulations of the Treasury authorize the collector and naval officer, upon the written application of the importer, to give him their joint certificate, that the goods entered by him for warehousing, describing them by their marks and numbers, are deposited in a designated warehouse; but the certificate contains no obligation or promise to deliver the goods, to the order of the importer, upon the return of the certificate, (Regulations of Treasury, p. 224, Art. 441,) and when the goods are in a private warehouse, no similar authority is given to the officer and proprietor, who, under the collector, have the joint custody of the merchandise there deposited. It may be, that without an express authority, such a certificate may be given by them, or either of them; but if this be admitted, it is manifest that the delivery by an importer, to a third person, of a paper, amounting to no more than the declaration of the fact of the storage of the merchandise, could never operate to change the property or the possession. We apprehend, that no Court would hold such a certificate, no matter by whom given, to be a receipt for the delivery of the merchandise, within the meaning of the statute.

There are, however, other provisions in the regulations of the Treasury which may be thought to have a bearing upon the questions we are to decide, and to which it will, therefore, be proper to advert.

Where the goods in a warehouse are intended to be withdrawn for consumption, the regulations provide that a new entry, called a withdrawal entry, shall be made; and if the importer wishes to enable a third person to withdraw the goods, upon the payment of the duties and charges, he may, by a certificate, to be signed by himself, and endorsed upon the entry, authorize the person named therein to withdraw the goods described in the entry. The withdrawal entry must then be compared with the original warehouse entry, in the collector's office, and with its

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duplicate in the naval office, and if found to be correct, a verified estimate of the duties must be endorsed upon the duplicate entry; and the amount of the duties, thus ascertained, having been paid, a permit for the delivery of the goods, from the warehouse, will then be given, either to the importer or the person named in his certificate of authority. (Regulation of the Treasury, pp. 225, 226, Art. 442.) It is evident, in reading these provisions, that they refer, in its different stages, to one transaction. They evidently do not contemplate, that the new entry shall be made, nor an authority to a third person be given, except with a view to the immediate payment of the duties, and the actual withdrawal of the goods. But it, doubtless, may happen, and it is not improbable, does frequently happen, that after the withdrawal entry has been made, and an authority to a third person been given, the duties may be suffered to remain unpaid, and the goods to continue in the warehouse. It may be said, that in such a case, if the person claiming, under the authority, is a purchaser or pledgee, it ought to be held, that he is constructively in possession of the goods, and has acquired a property therein, absolute or special, according to the nature and terms of his contract with the importer. But, although these questions may well arise, when the importer of the goods is also the owner, between him and the person whom he has authorized to withdraw them, or between the latter and a subsequent purchaser, yet we do not see how they can arise when the importer is merely a factor, and the controversy is between the person whom he has authorized to withdraw the goods, and the innocent owner, to whom these proceedings of his agent were wholly unknown, and who would be defrauded by holding them to be valid. We cannot suppose that it would ever be contended, that an authority so given, by a fraudulent agent, even where such agent is believed to be the owner, is a document of title, within the meaning of the statute. It would be a perversion of language and of reason, to say, that a certificate, signed by the factor himself, in the books of the custom-house, is a warehouse-keeper's receipt for the delivery of the goods. It is no more such a receipt than it is a bill of lading or a custom-house permit; and we hold the proposition to be too clear for argument, that when a factor attempts to pledge the goods of his principal, by any instrument, or the transfer of any

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instrument, not mentioned in the statute, it is by the rules of the common law, and by those alone, that the validity of the pledge, as against the owner, must be determined. There are no general words, in the statute, embracing any other evidences or symbols of title than those which it enumerates.

The only observations that require to be added, relative to contracts with a factor, founded on his possession of a document of title, are these :—

First.—That to render the contract valid, as a pledge under the third section of the statute, it must appear that the document was transferred when the advance, it was intended to secure, was made. The acts must be simultaneous. And *next*.—It must appear, that the document, although in other respects, such as the statute describes, was intrusted to the factor by the owner of the goods to which it relates.

1st. It is plain, that when there is an interval of time between the advance of money or negotiable securities, and the transfer, to the lender, of a document of title, the contract, although a pledge of the document is meant to be created, is purely executory, and in reality is not founded on the security of the document, but merely on the promise that this security shall be given. Hence, although the advance may constitute a present debt, and the promise be fulfilled on a subsequent day by the transfer of the document, the contract, if valid at all against the owner, is only so under the fourth section of the statute, as a deposit to secure an antecedent debt, and is only valid to the extent which that section authorizes. In England, the law is thus settled by many decisions; in one of which, although the advance was made on a Saturday, and the document relied on as its security, was transferred on the following Monday morning, it was held, that the contract was not protected under the second section in the Act of Parliament, which corresponds substantially, it has been shown, with the third section in our own statute.

We see no reason to doubt, that the cases to which we refer were properly decided. Indeed, as a transfer of possession is in all cases essential to a pledge, there seems no escape from the conclusion that they were so. (*Bonzi v. Stewart*, 4 Mann & Gran. R. 295; *Taylor v. Kymer*, 3 Barn. & Ad. R. 320; *Taylor v. True-man*, 1 Mood. & Mal. R. 453; *Ross v. Willis*, Daws. & Lloyd Mer-

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cantile Cases, 19.) Upon the same principle, if the original advance, made by a person claiming to be the pledgee of a document of title, was made in negotiable securities, which, when they fell due, were renewed by the substitution of other securities of the like character, and the application of their proceeds to the payment of the first, the renewal is not considered as an advance upon the faith of the document, although it may then be in the possession of the lender; but the question, whether the contract was valid, under the third section of the statute, must be determined by the facts as they existed at the time of the original advance. Hence, if this advance preceded the transfer of the document, the pledge, as against the owner, is void. (*Phillips v. Huth*, 6 Mees. & Wels. R. 600; *Taylor v. Truemann*, 1 Mood. & Mal. R. 453.) So, where the original advance was upon securities belonging to the factor himself, which the lender gives up, and receives in exchange a document of title of goods belonging to the principal, the exchange does not create a pledge protected by the statute, as it was not upon the security of the document that the advance was made. (Same cases, 8 Russell on Factors, pp. 182, 183.)

2d. We have seen that it was decided by the Court of Appeals, in *Covill v. Hill*, that where an advance is made to a factor upon a document of title, it must be proved that the document was intrusted to him by his principal; but the rule is there laid down in general terms, and it is therefore necessary to consider more particularly in what cases, and under what circumstances, the acts of the owner may be regarded as evidence that he had intrusted the factor with the possession of a document of title, which is alleged to have been so pledged, to bring the contract within the protection of the statute.

This was the principal question in the important case of *Phillips v. Huth*, (6 Mees. and Welsb. R. 572,) in which it was very fully and ably discussed by the counsel, and, in a very elaborate and lucid judgment, determined by the Court.

The action was for money received by the defendants to the use of the plaintiffs, and the claim was founded, in a great measure, on the following facts:—

The plaintiffs had placed the bills of lading of two cargoes of tobacco, of which they were the owners, in the hands of Warwick & Claggett, commission merchants, as their factors, for sale, and

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the latter were thus enabled to enter the cargoes at the custom-house in their own name, and to obtain in their own name certain dock warrants, which are a document of title specially mentioned in the Act of Parliament. They pledged these warrants to the defendants, Huth & Co., as a security for advances made to themselves, of more than £20,000 sterling, and subsequently became bankrupt, leaving the debt thus contracted wholly unpaid. Huth & Co. sold the tobacco, and after deducting their advances and charges, paid the balance into Court; and the question was, whether the plaintiffs were not entitled to recover the whole proceeds of the sale. The jury, upon the trial, found a verdict for the defendants, and the case was before the Court upon a motion to set aside the verdict, upon the ground of a misdirection of the Judge, and as against evidence; and it was to the question, whether the plaintiffs had intrusted Warwick & Claggett with the possession of the dock-warrants, that the arguments of the counsel were chiefly, but not wholly directed. The contention on each side was substantially the same as that of the learned counsel in the case before us. It was insisted, on the part of the plaintiffs, that no document ought to be regarded as intrusted to the factor which the owner had not delivered or transmitted to him, or which the owner had not the opportunity of seeing, so as to enable him to make it in such a manner as to indicate his own title to the property; while on the part of the defendants, it was contended, that in judgment of law, every document must be deemed to have been intrusted to the factor, which his possession of a bill of lading, delivered or transmitted to him by the owner, enabled him to obtain.

Neither of these constructions was adopted by the Court.

The first was rejected as too strict and literal, and limiting the authority of the factor within much narrower bounds than it was reasonable to believe that the owner meant to impose; the second, as going beyond any meaning that could justly be attributed to the word "intrusted," and inconsistent with the probable intentions of the Legislature in the use of the term.

The conclusion to which the Court arrived was, that not only must every document be deemed to have been intrusted to the factor, which the owner, personally or by an agent, had delivered or transmitted to him, but that the term was justly applicable to

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every document which there was evidence to show that the owner intended that the factor should possess at the time, and in the form in which he obtained its possession ; and that this intention of the owner, when not expressly proved by his instructions, might be inferred from the facts, that the document was one which it was necessary that the factor should obtain, to enable him to sell the goods, or that he was justified in obtaining, by the ordinary course and usage of trade, in reference to the sale of goods of the description of those that were consigned to him ; or, expressing the proposition in more general words, that the document was obtained by the factor in the proper and ordinary mode of discharging the duties of his trust. Upon the ground that the verdict of the jury was unsupported by any evidence, that the plaintiffs intended that their factors, Warwick & Claggett, should procure the dock warrants which they pledged, it was set aside and a new trial granted.

Exactly the same questions arose, and were again fully discussed in a case, which subsequently came, on a writ of error, before the Court of Exchequer Chamber, and in which the facts were substantially the same as in *Phillips v. Huth*, (*Hatfield v. Phillips*, 9 Mees. & Wels. R., 647.) The Court expressing its conviction that the question had been rightly determined in *Phillips v. Huth*, and stating some further reasons in support of the decision, affirmed the judgment for the plaintiffs that had been rendered in the Court below, and subsequently this judgment of affirmance was itself affirmed in the House of Lords, upon a consultation of all the Judges, and by their unanimous advice. (*Hatfield v. Phillips*, 12 Clark & Finelly, R. 343.)

Had we entertained any doubts as to the soundness of the doctrine thus established, they must have been yielded to the force of the authorities that have been cited. But we have no such doubts. When an agent fraudulently pledges a document, which in reality was intrusted to him by his principal, it is just that the latter should bear the consequences of an act which the very form and terms of the document enabled the agent to commit. But when the document is procured or manufactured by the agent himself, in violation of his trust, it is not just to visit upon the principal the consequences of an act which he had no reason to anticipate, and which was not the result of the confidence that

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he reposed, and of the means that he had furnished. It is impossible to say, that a document procured by the fraud of the agent himself, was intrusted to him by his principal, and to cast upon the principal a loss, resulting from the fraudulent use of such a document, would be as unjust, as all would confess it to be, had the document been forged or fraudulently obtained.

We shall proceed, then, to apply the term "intrusted" in that reasonable definition, which has been given to it in England, and which we accept, to the documents of title mentioned in our own statute. A bill of lading, which has been delivered or transmitted by the owner, or by his direction, to a factor or other agent, is manifestly a document with the possession of which the agent has been intrusted by his principal; so also is a custom-house permit for the landing of the goods, when the duties have been paid; for this is a document which the factor must have, to enable him to obtain the possession of the goods, and perform his own duty in selling them; so, where the factor has no warehouse of his own, in which the goods may be stored, the receipt of the keeper of the warehouse, in which he deposits them until he can effect a sale, may be termed a necessary document, and is certainly a document that the usage of trade justifies the factor in obtaining. But without evidence of the actual intentions of the owner, it is certain that we cannot apply these observations, either to a warehouse permit, or to the receipt of the keeper of a bonded warehouse, even could it be admitted that each of these documents may be so framed and expressed, as to be the subject of a pledge, creating an immediate and valid lien upon the goods to which it relates. Hence, unless there is evidence that the factor was expressly instructed or authorized to bond the goods on their arrival, or was warranted in doing so, by a previous course of dealing between him and the owner, or by a known usage in relation to the storage and sale of similar goods, it would be impossible to say, that either a warehouse permit or a bonded store-keeper's receipt is a document that was intrusted by the owner, within the meaning of the statute. In the absence of such proof, of the intentions of the owner, a Court of Justice would be compelled to say, that the document was obtained by the factor, not in the execution, but in violation of his trust.

II. We pass now to a brief consideration of the second class of

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the cases in which the statute gives validity, as against the owner, to a contract with a factor, or other agent, for the sale or disposition of the goods intrusted to him. The words of the statute apply to "every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon."

We do not think it necessary to hold that the words "not having the documentary evidence of title," are to be strictly and literally construed, so as to invalidate every contract made by a factor in the actual possession of the merchandise intrusted to him, if he has at the time in his possession some documentary evidence of title. If a factor who has paid the duties, and deposited in his own store the goods consigned to him, retains in his possession a duplicate bill of lading, we incline to believe that this fact would not be held to vacate a contract for the sale or disposition of the goods that would otherwise be valid. The words used are indeed susceptible of this construction; but it would hardly be reasonable to suppose that such was the intention of the Legislature. The words, "not having the documentary evidence of title," may probably refer to the cases in which a document of title, as evidence of the ownership, real or apparent, of the factor, is no longer necessary to enable him to transfer the title or possession of the goods intrusted to him, and consequently are applicable—although the documents of title may be still in his possession—if like a bill of lading, after the landing of the goods, they have performed their office, and are no longer of use or value as instruments of transfer.

Whichever construction of these words be adopted, it is clear that the possession of the factor, in the clause we are considering, means an actual, as distinguished from a constructive possession. For where the goods are in the actual possession of a third person subject to a lien, and that of the factor is a merely constructive possession, he must necessarily have documentary evidence of his title or authority to enable him to control their disposition. Hence the propriety of the distinction which the statute makes between the two classes of cases, in which it gives validity to the contract of a factor; those in which his possession being merely constructive, a change of the title or possession of the goods in-

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trusted to him can only be effected by means of the transfer and delivery of a document of title; and those in which his possession being actual, the necessary change may be effected by the transfer and delivery of the goods themselves.

We have seen that the English statute does not embrace the case of the actual possession of the factor, but is limited to contracts resting solely on documentary evidence; and it was this defect, or supposed defect, that our statute was doubtless meant to supply, by making the actual possession of the factor sufficient evidence of his ownership, to those who, upon the faith of such ownership, might become the purchasers or pledgees of the goods intrusted to him for sale.

The observations of Lord Denman, who delivered the judgment of the Court in *Hatfield v. Phillips*, will illustrate the distinction between constructive and actual possession, and may properly be adduced in confirmation of the remarks that have been made. His language is, that when the factor "receives the goods into his own warehouse, it is clear that neither by the common law, nor by the statute, (6 Geo. IV., c. 94,) can he pledge the goods, nor will there, then, be any document indicative of title which can bring him within the second section of the statute. If they remain in the dock warehouse, and are only in his constructive possession, he will be authorized to do such acts and procure such documents as are necessary and proper to enable him to sell the goods. To this extent, and no further, is he intrusted, in the absence of any specific instructions or authority," (9 Mees. & Wels. R. 609.)

These last remarks, it is obvious, are just as applicable under our statute when the goods are in a bonded warehouse, and it is with these we shall conclude our exposition of those provisions, in section third of our Act, that we conceive to have any bearing upon the questions we are to decide.

The general conclusions from this discussion, omitting subordinate parts, and confining ourselves to the contract of deposit or pledging, are these:—

First. That the constructive possession of goods, by a factor for sale, can only be changed in favor of a pledgee, by the transfer and delivery to the latter of some one or more of the documents of title mentioned in the statute.

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Second. That to render the contract valid as a pledge, it must also appear that the document transferred,—if otherwise, such as the statute describes,—had been intrusted to the factor by the owner of the goods, and that, in the application of this rule, the term “intrusted” must be understood in the sense that has been given to it by the decisions to which we have referred.

Third. That the possession of a factor, “not having the documentary evidence of title,” that can alone enable him to create a pledge, valid as against the owner, is an actual, as distinguished from a constructive possession; and hence, it is only when such is the character of his possession, and only by the transfer and delivery of the goods themselves, that a valid pledge, under this provision in the statute, can be effected; and,

Lastly. That in all cases, to render the contract valid, the change of possession, whether constructive or actual, must be made at the time the advance is made, which the pledge is intended to secure.

We shall now proceed to apply the views that we have deemed it necessary so fully to develop and sustain, to the transactions between the factors, Mosquera & Co., and the defendants, Hitchcock & Reading, that have given rise to the present controversy; taking the facts from the answer of those defendants, but giving such an interpretation to the statements in their answers as may render them consistent with the Acts of Congress, and the regulations of the Treasury, to which we have referred.

The defence of Hitchcock & Reading is rested upon five successive advances, which they allege to have made in their own promissory notes, which they have since been compelled to pay, at different times and in different sums, to Mosquera & Co., upon the security of distinct parcels of the bark in controversy, and upon the faith that Mosquera & Co. were the owners of the property they undertook to pledge. It is true, that two other advances are stated in their answer; but as it is apparent that these were made merely by a renewal of notes before given, it is certain, and was very properly admitted, upon the argument, that they made no alteration in their rights, and no addition to the security which they then held. Unless there was a valid pledge for the advances, when originally made, none was created by their renewal.

The following are the facts in relation to the first and largest

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advance, as stated in the answer: That early in July, 1856, Mosquera & Co. applied to the defendants for a loan or advance of their negotiable promissory notes, to the amount of \$32,000, and they, the defendants, made this advance, in eight promissory notes for different sums, payable, each 60 days after date, and dated respectively the 1st, 2d, 3d, or 5th of July, 1856, upon which last day the notes were delivered; that this advance was made upon the pledge and security of two distinct parcels of bark, one of 408 ceroons, all of which are claimed by the plaintiffs, and the other of 438 ceroons, of which 366 are claimed by the plaintiffs; that the 408 ceroons, when the advance was made, were in the possession, in store, of Mosquera & Co., and even stood in their own names, at their own risk, and subject to their own order, and that the 438 ceroons were then on their way to Mosquera & Co., from Santa Martha, and arrived at this port on or about the 12th day of July, 1856; that Mosquera & Co., at or about the time they received the advance of the notes before mentioned, transferred to the defendants the 408 ceroons, with authority to sell the same, and also gave to them a letter of consignment, of the 438 ceroons, then about to arrive, with like authority to sell the same. That upon the arrival of the 438 ceroons, Mosquera & Co. obtained the usual custom-house permits, for the landing and storing the same, and delivered them to the defendants, and that the bark was, thereupon sent to one of the public stores, and was there stored for the account, and at the risk of the defendants, and the same has since been, and is still, held in store for their account, and subject to their order. These, together with the averments that the defendants Hitchcock & Reading, when they advanced their promissory notes, believed that all the ceroons of bark, so pledged, were owned by Mosquera & Co., and had no knowledge, information or notice that any of them belonged to the plaintiffs, or that the plaintiffs had any interest therein, are all the material allegations in their answer, in relation to the first advance, by which they claim to have acquired a lien, which the statute has rendered valid, against the claim of the plaintiffs, as owners.

It is manifest, however, that they acquired no such lien upon either of the parcels of bark, that they allege to have been pledged to them, if we have rightly construed the provisions of the statute, and the decisions and authorities that we have cited

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are to be respected and followed. The facts relied on are no evidence of a contract to which the statute has given validity, so as to exempt the defence from the application of the rules of the common law.

First.—As to the 408 ceroons. If the allegation, that they were in the possession of Mosquera & Co., in store, and, were at the time of the advance, transferred to the defendants, could be understood as meaning that they were in the actual possession of Mosquera & Co., in their own store, and that this actual possession was transferred to the defendants, as Mosquera & Co. had then no documentary evidence of title, the contract might well be sustained as a valid pledge within the meaning of the statute. But these allegations in the answer cannot be thus understood; for, in this sense, they cannot be true. The 408 ceroons, it is admitted, in all the answers, are a part of the 1539 ceroons shipped and claimed by the plaintiffs, and all of which, it is also admitted, are now in one of the public or bonded warehouses in the city. The 408 ceroons were, therefore, it is certain, in a bonded warehouse, when the attempt to pledge them was made, or they would not be there now. If they had once been withdrawn, upon the payment of the duties, there is no provision of law that could have enabled Mosquera & Co., or the defendants, to claim a return of the duties, and place the goods again in bond. These ceroons, therefore, were only in the constructive possession of Mosquera & Co., when the defendants made the advance, and it is not averred or pretended that this possession was changed by the transfer and delivery of any document of title mentioned in the statute; and it has already been shown, that it is only by such a transfer that the constructive possession of the factor can be changed, and a pledge of the goods, as against the owner, be created. If, by the allegation, that Mosquera & Co. transferred these ceroons to the defendants, we are to understand that they made the transfer, and gave to the defendants an authority to sell the bark, to reimburse their advances, by an instrument in writing, the allegation, thus understood and admitted to be true, would, in no respect, alter the case in favor of the defendants. Whatever might have been the legal effect of such an instrument, as between the parties, had Mosquera & Co. been the owners of the bark, its execution could not operate, either to alter the constructive possession of Mosquera

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& Co., as importers, or to divert the title or affect the rights of the plaintiffs, as owners. Under the regulations of the Treasury, the bark still remained on the books of the custom-house, subject to the order of Mosquera & Co. alone, and this constructive possession they still held, in the character in which alone they had acquired it, as factors for the plaintiffs.

Second.—As to the 438 ceroons, the facts are, if possible, still stronger against the defendants. They made the advance of their notes before the arrival of the bark, not upon the transfer and pledge of any document of title, but merely upon the verbal assurance of Mosquera & Co., that upon the arrival of the ceroons, the required security would be given. Before such arrival, no pledge of the bark, creating a lien, valid against the plaintiffs, could be made, otherwise than by an indorsement and transfer of the bill of lading, and it is not averred or pretended, that any such indorsement and transfer was made. Nor is it even alleged, that Mosquera & Co. had any bill of lading in their possession, when they received the advance. It is true, that it is alleged, that Mosquera & Co. gave to the defendants a letter of consignment of the 438 ceroons, then about to arrive; but, what is meant by a letter of consignment, which is not a bill of lading, and which is given before the arrival of goods, by a consignee, and not a consignor, we do not profess to understand. It is sufficient to say, that whatever may have been the terms, or legal effect of the document to which this novel appellation is given, it was not a document mentioned in the statute; it was not intrusted to Mosquera & Co. by the plaintiffs; nor could its execution have created a lien upon the bark before its arrival. Had Mosquera & Co. sold the bark to a purchaser, in good faith, and transferred to him the bill of lading, we cannot doubt that the vendee would have acquired an absolute title.

The next allegation, that upon the arrival of the 438 ceroons, Mosquera & Co. obtained the usual custom-house permits for the landing and storing of the bark, and delivered them to the defendants, were much relied on by the counsel for Hitchcock & Reading, upon the argument; yet, it is quite certain, for many reasons, that the delivery of these permits created no lien upon the goods, to which they related.

First.—The permits were delivered a week, or longer, after

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the defendants had advanced their notes. Hence, if they were a security at all, which we cannot believe, they were so for the antecedent debt, only to the extent of any balance then due to Mosquera & Co.

Second.—As the bark was immediately sent to a public store, such permit must have been a warehouse permit; and, therefore, not a custom-house permit and a document of title within the meaning of the statute.

Third.—The delivery of these permits, gave to the defendants no control whatever over the bark; it gave to them neither a title, nor a right of possession, nor the means of obtaining possession. All that they could do with the permits, was to deliver them to the inspector, on board the vessel, to enable him to send the packages they described to the designated warehouse. The permits, had they chosen not to deliver them, would, in their hands, have been of no use or value whatever. The only consequence would have been, that as the vessel must have been unladen, and the duties were unpaid, other permits, for landing the bark and sending the packages to a bonded warehouse, must have been issued.

Lastly.—Had these permits been documents of title, within the meaning of the statute, and as such capable of being so pledged as to create a lien upon the merchandise they described, we have no right to say, that they were documents intrusted to the factors, Mosquera & Co., by the plaintiffs. When goods are consigned to a factor for sale, the presumption is, that he is to pay the duties as well as the freight, take the goods into his own possession, and bring them into market, for sale, immediately on their arrival; and we apprehend, that this presumption can only be repelled by evidence that the consignor intended that the goods should, upon their arrival, be placed in a bonded warehouse, to be withdrawn, for consumption, on a future day, or sold, subject to the duties, while under bond. There are no allegations, in the answer, that Mosquera & Co. were instructed by the plaintiffs to bond the goods, upon their arrival, or that the proceeding was warranted by any previous course of dealing between the parties, or by any known usage of trade in relation to merchandise of the like description; and in the absence of such evidence, of the intentions of the plaintiffs, and following the doctrine in *Phillips v. Huth*,

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we hold ourselves bound to say, that the procuring of the warehouse permits, by Mosquera & Co., was a proceeding not authorized by the plaintiffs, as owners, and contrary to their own duty as factors. Hence, could the warehouse permits be otherwise regarded as documents of title within the statute, they were procured by the wrongful act of the factors, and were not intrusted to them by the owners.

The allegation, which follows that of the delivery of the permits, that the 438 ceroons were sent under the permits to one of the public stores, and were there stored, for the account, and at the risk of the defendants, Hitchcock & Reading, and have ever since so remained, subject to their order, cannot be true, in the sense that the words naturally suggest, unless we suppose, that, in this instance, the provisions of the Acts of Congress, and the regulations of the Treasury, to which we have before specially referred, were wholly disregarded. As Mosquera & Co. held the invoice and bills of lading, it is certain that they made the necessary entry of the bark at the custom-house, as importers, and we have seen that the Act of Congress, the first warehousing bill, expressly provides that all goods entered for warehousing, shall be stored and kept at the charge and risk of the importer, and subject at all times to his order, upon payment of the duties and expenses; and by the regulations of the Treasury, this constructive possession of the importer must remain unchanged, until the withdrawal entry is made, and an authority to withdraw the goods is given, by the importer, by an indorsement on the entry, to some other person. It is impossible, therefore, that the 438 ceroons could have been placed originally, by any entry on the books of the custom-house, to the account of the defendants, Hitchcock & Reading, so as to be, from that time, at their risk, and subject to their order, unless we impute to the officers of the custom-house, including the collector himself, a gross violation of their duties, as prescribed by law, and such an imputation we have assuredly no right to make. We must, therefore, understand the allegation, that the ceroons in question, were stored for the account, at the risk, and subject to the order of the defendants, as meaning only, that such was the understanding and agreement of the parties themselves; not that a constructive possession was thus vested in the defendants by any act or proceeding of the

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officers of the customs, or by any entry on the books of the custom-house; and, thus understood, the allegation is plainly immaterial. We add, that even had the allegations been true in the sense, which they obviously suggest, and perhaps were meant to be understood, they would not have affected the rights of the plaintiffs, since their truth would have been no evidence, that Hitchcock & Reading acquired a constructive possession of the ceroons claimed by the plaintiffs, by the transfer, and upon the security of any document of title mentioned in the statute, and intrusted, by the plaintiffs, to Mosquera & Co. The truth of the allegation would have been evidence, only, of a fraud committed by the factors upon the owners, not resulting from any confidence which the owners reposed, and a constructive possession thus acquired by pledgees, is no more protected, by the statute, than the rules of the common law.

The observations that have now been made, in relation to the first advance made by the defendants, Hitchcock & Reading, will be found to apply, in a greater or less extent, to all their subsequent advances; and hence, in relation to their title, nothing more will be necessary than a statement of the facts, as alleged in their answer, and the conclusions that, according to our views of the law, are necessary to be drawn, will be at once perceived.

The material allegations, in their answer, in respect to their second advance, are these: That on or about the 15th of July, 1856, Mosquera & Co. applied to the defendants for another loan or advance of their negotiable paper, to the amount of \$20,000, upon the security of other 342 ceroons of bark, specified in a custom-house permit, which they then held, and upon the further security of other 800 ceroons, which, they stated to the defendants, were then being landed from a vessel in this port, the whole 642 ceroons being parcel of the 1539 now in store, and claimed by the plaintiffs; that the defendants, upon the security and pledge of the same bark, and upon the faith that Mosquera & Co. were the owners thereof, then advanced and delivered to Mosquera & Co. their promissory notes, amounting in the aggregate to \$20,000, and that Mosquera & Co., to secure the payment of the notes, then transferred and delivered to the defendants the custom-house permit, for the 342 ceroons, and consigned to them the 800 ceroons, and gave them authority to

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sell the same, and agreed to procure the necessary permit for landing and storing the 300 ceroons, and to procure all the ceroons, to be stored in the name, for the account, and subject to the order of the defendants; and, after such storage, to procure and deliver to the defendants the usual warehouse-keeper's receipts therefor.

Stopping here, it is manifest that no distinction, in law, can be stated between this case and the first advance. The permit for the 342 ceroons must, and could, only, have been a warehouse permit; it was, therefore, not the custom-house permit mentioned in the statute, and alone intended by the Legislature. It was not, from its terms, capable of being made the subject of a pledge, creating a lien upon the property it specified, and it was not intrusted to Mosquera & Co. by the plaintiffs. As to the 300 ceroons, the advance was not upon them, as a present security, but merely upon a promise that, on a future day, the security should be given. The contract, therefore, under the 3d section of the statute, was, in respect to the plaintiffs, clearly void.

The answer, however, proceeds to aver, that some days thereafter, and about the 5th of August, Mosquera & Co., in pursuance of their agreement, procured, and delivered to the defendants, a warehouse-keeper's receipt, signed by Matthews & Romaine, keepers of the bonded warehouse, Nos. 9 and 11 Bridge street, for the 438, 342 and 300 ceroons above-mentioned, making, in all, 1080 ceroons, and that the receipt stated, that all were held, for the account, and at the risk of the defendants, and that the 438 ceroons and the 342 ceroons were then transferred to the defendants; and it was upon these allegations, that the counsel for the defendants laid much of the stress of their argument. They earnestly contended, that the necessary effect of the receipt was to transfer, to the defendants, the possession, actual or constructive, of all the ceroons that it embraced, so as to give them, at least, from the time of its delivery, a valid lien upon, and a full power of disposition over the whole.

We do not think so. It does not appear who were the persons who signed the receipt, whether the proprietors of the warehouse, or the custom-house officers in charge; but whoever they were, it is quite certain, that they had no authority, by law, to give such a receipt; that they violated their duty in giving it, and

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that the facts, which it states, were not, and could not be true. By no proceeding authorized by law, could the bark, mentioned in the receipt, be placed to the account, and at the risk of the defendants, and be so held, either by the signers of the receipt or by any other persons, so long as it remained in a bonded warehouse. So long as it so remained, the actual possession was in the collector, the constructive in Mosquera & Co., as importers, and it was only with the assent, and by some act of the collector, that the possession, actual or constructive, could be changed. To procure such a receipt, was a fraud upon the rights of the plaintiffs, and it would be monstrous to say that a receipt, procured and manufactured by factors, for their own purposes, is a document of title, within the statute, intrusted to the factors, by the owner. We do not hesitate to reject wholly the supposition, that by the delivery, to the defendants, of a receipt, so procured, the rights of the plaintiffs, as owners, were, or could be affected.

The advances that remain—the 3d, 4th and 5th—will not long detain us: Like the preceding, they were all made in the negotiable notes of the defendants, and upon the security, it is affirmed, of different parcels of the bark in controversy.

The third advance amounted to \$16,000, and was made on the 6th of September, 1856, on the pledge, it is alleged, of 239 ceroons, 48, only, of which belonged to the plaintiffs; that the said 48 ceroons were transferred by Mosquera & Co. to the defendants, with a large quantity of other bark, in the month of April, 1856, in pledge, and as security for the re-payment of the notes of the defendants, to the amount of \$40,000, which, at that time, they advanced to Mosquera & Co.; that at this time, Mosquera & Co. had the said 48 ceroons in possession, and in store in this city, stored in their names, at their risk, and subject to their order, and that the same were not withdrawn from the possession of the defendants, by Mosquera & Co., but remained in such possession, until the 6th day of September, when the defendants advanced their notes for \$16,000, as above mentioned, upon the pledge and security thereof.

It seems manifest, that these statements are wholly unsatisfactory. It appears to us, that they furnish no evidence whatever of a contract of pledge binding on the plaintiffs. They amount to no more than a general allegation, that the 48 ceroons were

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transferred and pledged to the defendants, as a part of their security, for the advance, which they then made; but we cannot doubt, that the defendants, in order to bring themselves within the protection of the third section of the statute, were bound to show, that the transfer was made, and the security was given, by means of some one or more of the documents of title specified in the Act. Not only, however, does the answer contain no such averment, but it is certain, that as the ceroons were placed in a bonded warehouse immediately upon their arrival, and as the advance of the defendants was not made until they were in store, no such averment could, with truth, have been made; there could have been no transfer of the bill of lading, for that had performed its office, and could no longer pass a title, by its indorsement; as the permit issued by the custom-house, for the landing of the bark, was necessarily a warehouse permit, it was not the permit that was alone intended by the statute; and if a receipt was given by the keepers of the bonded warehouse, it was not a receipt for the delivery of merchandise, within the meaning of the statute. It was a document which the keepers had no right to give, nor Mosquera & Co. any right to obtain—a document not authorized by the Acts of Congress, nor warranted by the provisions of the statute, but issued and procured, in contravention and fraud, of the rights of the plaintiffs as owners.

The fourth advance was of \$10,000, and was made, it is alleged, on or about the 18th of September, 1856, upon the pledge and security of 316 ceroons, only 24 of which are included in those owned and claimed by the plaintiffs: The allegations are, that the whole 316 ceroons were then stored in the name, at the risk, and subject to the order of Mosquera & Co., who at the time they received the advance, delivered to the defendants a warehouse-keeper's receipt for the whole of the bark so stored, and gave them authority to sell the same, and that the same has since remained stored in the name, and at the risk, and subject to the order of the defendants.

No observations here seem to be necessary. The warehouse-keeper's receipt, so far as the rights of the plaintiffs are concerned, was inoperative and void, and the averment, that the bark has since remained in store in the name, at the risk, and

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subject to the order of the defendants, for reasons that have been before fully given, cannot be true.

The fifth, and last advance, was made on or about the 22d of September, 1856, to the amount of \$5000, upon 150 ceroons of bark, of which 51 were the property of the plaintiffs. The whole 150 ceroons were then in one of the bonded warehouses in the city, subject to the order of Mosquera & Co., who, at the time of the advance, made a consignment, to the defendants, of the ceroons, with authority to sell the same, and that the 51 ceroons have, since that time, remained stored in one of the bonded warehouses in the city, in the name, and at the risk, and subject to the order of the defendants.

Here, also, no remarks can be necessary, to show the entire invalidity of the transaction. It does not appear to have been founded upon any documentary evidence of title whatever, and, we know, could not have been founded upon the faith and transfer of any one of the documents of title that are alone specified in the Act. To hold, that the title of the owner may be divested, or his rights be affected by any other means than such a transfer, when the possession of the factor is merely constructive, would be, in our judgment, to repeal the statute.

We have reserved one or two remarks, which seem to be applicable to all the transactions set forth in the answer of the defendants. Although merchandise, in a bonded warehouse, is declared, by the Acts of Congress, to be subject to the order of the importer, making the entry, yet, by the regulations of the Treasury, the importer can only exercise his power, so as to enable a third person to obtain possession of the merchandise, by an authority, in writing, to such person, to withdraw the goods, signed by himself, and indorsed upon a withdrawal entry; and the answer of the defendants contains no averment, that, with respect to any of the transactions, by which they claim to have acquired the possession of the bark belonging to the plaintiffs, any such withdrawal entry was made, or written authority given. It is true, that had these facts been alleged, and admitted to be true, they would not have amounted to a defence, against the claims of the plaintiffs, but they might, perhaps, with propriety, have been regarded as evidence, that the defendants had acquired

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the constructive possession of all the bark, that they allege to have been pledged to them.

From the views, that we have felt it our duty so fully to express, in the conviction that the provisions of this important statute, "The Factors' Act," have been too generally misunderstood, and that practices wholly inconsistent with their just interpretation, have extensively prevailed, it is a necessary result, that we cannot hold, that the transactions relied upon by the defendants, all or any of them, are any evidence of a contract, rendered valid by the provisions of the statute, so as to entitle the defendants to that lien and power of disposition over the property of the plaintiffs, which they now assert. Not one of the transactions was founded upon the faith and transfer of any document of title, specified in the Act, or intrusted, by the plaintiffs, to their factor.

II. We have thus considered, with a degree of particularity, which the importance of the subject seemed to us to require, the construction of the third section of the Act in question, and have stated our reasons for holding, that the claim of the defendants, Hitchcock & Reading, to retain the plaintiff's property, under the provisions of that section, cannot be sustained.

It is obvious, we think, that the fourth section of the Act can receive no construction more favorable to the views of those defendants.

It might, perhaps, be just to say, that where the attempt to pledge the goods is made to secure a then present advance, if it fail in the requisites to give it validity, under the third section, it must be altogether void,—void at the common law, and not within the provisions of the statute. The fourth section would not in terms, nor by any latitude of construction, embrace it. The transaction could not then be called a deposit as a security for an antecedent debt or demand; and if it cannot be sustained within the terms of either section of the statute, it is simply a transaction not covered by the statute, and which, by the common law is void, as a fraud upon the rights of the owners.

But it has been already observed, that it appears by the answer of the defendants, Hitchcock & Reading, that certain of the alleged advances were made, before the arrival of portions of the

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bark which they claim to hold as security therefor, and were made, in reliance upon the promise of Mosquera & Co., subsequently performed, by the alleged transfer; and that if the transaction be valid at all, against the owners, it is so only under the fourth section of the statute, as a deposit to secure an antecedent debt.

The provisions of the fourth section are, that "Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right, or interest in or to such merchandise or document, other than was possessed, or might have been enforced by such agent at the time of such deposit."

Under these provisions we observe, first, that there is a very important distinction between a mere delegation to a depositary, of the right to receive the amount due to the factor, for which he has a lien upon the goods, and a deposit with a third person, as security for a debt due by the factor, which divests the factor of all control over the goods.

The first-named delegation, accompanied by a delivery of the possession of the goods, was held valid before the statute; but the transaction was carefully guarded by rules, designed for the protection of the owner. In *Urquhart v. McIver*, (4 J. R. 108,) it was held, that although a factor could not pledge the goods of his principal, yet he might deliver them to a third person, with notice of his lien, in order to preserve that lien. The possession of the third person, in such case, was deemed a continuance of the factor's possession. And the case of *McCombie v. Davies* (7 East. R. 5) sustained such a transfer, although the purpose of the transfer was to secure the depositary, for moneys due to him by the factor. A very important qualification of the right to transfer the possession for such a purpose is, that to sustain such a delegation of the factor's lien to another, the third person must be under the authority of the factor, and the possession of the goods must be held for the purpose of securing and carrying out the object of the original consignment. (*McFarland v. Wheeler*, 26 Wend. R. 467.)

It is certain, we think, that this is not the deposit contemplated by the fourth section of the statute, and it requires no discus-

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sion to show, that the alleged transfer, to the defendants, is not of this description.

The statute was evidently designed to give to the depositary such right or interest as the factor possessed, or might have enforced.

In providing, that the depositary should not acquire any other right or interest than was possessed by the agent, the implication is necessary that, to the extent of the right or interest possessed by the agent, the depositary shall become entitled, and to the extent of such right or interest, he is substituted for the agent. The latter is thereby displaced, his control of the goods is divested;—a new agent, in whose selection the owner has had no voice, in whose skill and judgment he has reposed no confidence, in whose integrity or fidelity he has in no wise trusted, has the control and disposition of the owner's property.

This is an alteration of the common-law rule, and the claimants must show themselves strictly within the statute.

Have the defendants, Hitchcock & Reading, accepted or taken any of the bark in question in deposit? The very terms of this section seem to us to require actual possession of the goods in the factor, and an actual transfer of that possession to the creditor; and if the introduction of the word "document" into the latter clause of the section may be taken to give validity to a transfer of a document of title, then, plainly, that document must be transferred. And the conclusion is irresistible, that the same transfer of possession is necessary, when possession without documentary evidence of title is relied upon, and the documentary evidence of title must be of the same description, when documents are relied upon, as is necessary, under the third section, to give validity to a transfer, for a present advance. And all the observations that we have made in relation to the nature of the documents required, and to the necessity of an actual transfer of the possession of the goods, are no less applicable to this, than to the third section of the statute.

Whether, under this fourth section, the depositary may acquire and enforce the right or interest which was possessed by the factor, notwithstanding he has notice of the owner's title, it is not material to consider.

There are some further reasons, which would constrain us to say, that the injunction in this cause ought not to be dissolved—reasons

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which should influence our determination of this appeal, if we deemed it doubtful whether the defendants, Hitchcock & Reading, could or could not be subrogated to the rights and remedies of Mosquera & Co., as against these plaintiffs. Upon which question, however, we think it proper to observe, that we consider it settled, that where a pledge was made by the factor which could not be sustained, as against his principal, it not only failed to invest the pledgee with any title, but it operated as a forfeiture of the factor's lien. As against the owner, the lien was gone forever. See the cases above referred to, and among them *Fielding v. Kymer*, (2 Brod. & Bing. R. 639,) is a striking example of the rigor with which this rule was enforced.

It is true that the plaintiffs, by their bill of complaint, offer to pay the amount which shall, upon a just accounting, be found due from them to Mosquera & Co. Notwithstanding the suggestion of their counsel, that such offer was made in ignorance of the extent and character of the lien claimed, by Hitchcock & Reading, it appears by the complaint itself, that they were aware that Hitchcock & Reading claimed a lien upon, or title to the bark, for advances made to Mosquera & Co.; and they, nevertheless, avow their readiness to pay to Tracy, assignee of Mosquera & Co., or to Hitchcock & Reading, (whichsoever may be entitled,) the balance due by them.

But if the cases, above referred to, shall govern the ultimate decision of this case, and the pledge be declared wholly illegal and void, then Tracy, the assignee of the insolvent debtors, Mosquera & Co., and not Hitchcock & Reading, will be entitled to the moneys due from the plaintiffs, and it will be a grave question, whether, (although such assignee does not set up that claim in his answer,) the Court may not feel bound to regard the interests of the creditors for whom Tracy is a trustee, and whose interests, if this view of his rights should prevail, he is bound to assert and maintain.

Be this as it may, having arrived at the conclusion, that the transfer to the defendants, Hitchcock & Reading, is not valid as a pledge, we cannot refuse to enjoin the latter against a sale of the goods, unless we are prepared to assert two propositions, to which, in this stage of the litigation, at least, we are not prepared to assent: First, That although the transfer, to the defendants, Hitchcock & Reading, cannot operate as a pledge of the goods, it

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may, by equitable construction, have effect as a transfer of the debt due by the plaintiffs; and, second, That, notwithstanding the attempted illegal transfer of the plaintiff's merchandise, the lien thereon still continues, as a security for the moneys advanced thereon by the factors. The latter of these propositions is, as we believe, in contravention of principles well settled, prior to the statute, and, unless the claimant is within the provisions of the statute itself, we do not perceive that his position is thereby altered or improved. And, as to the first, we may say, (without designing to do more than express a doubt on the subject,) that where the attempt, in fact made, is to make an illegal transfer of the plaintiff's property, in actual fraud of his rights, it is not clear that any notion of equity calls upon us to sustain it for any purpose. And if, upon a final consideration of this case, the Court should feel called upon, under the pleadings herein, or otherwise, to hold the defendants, Hitchcock & Reading, entitled, by constructive transfer, to the sum due from the plaintiffs, and to require the payment of that sum, according to the offer in the complaint, it would by no means follow that the defendants, Hitchcock & Reading, should be permitted to go on and sell the merchandise, in their discretion. The plaintiffs have a right to require that, if this view of the rights of the parties be taken, they be permitted to redeem the property, according to the prayer of their complaint, and, in that mode, obtain the control of the property, for disposition, in the manner, and at the time most agreeable to their own view of their interests.

The order appealed from must be reversed, and an injunction be granted, according to the prayer of the complaint.*

Ordered accordingly.

* The judgment of the Court, in this case, was announced by Mr. Justice Woodruff, who stated, as the reasons of the Court, the views contained in the opinion of Chief-Judge Duer, in which views the other Judges, who heard the argument, substantially concurred. Chief-Judge Duer did not sit in Court after the 9th of January, 1868, the day of the casualty, (6 Duer, ix.) from the effects of which he never fully recovered, although he subsequently wrote several opinions of much interest, and with his usual vigor and ability, in causes previously argued at General Terms, held by himself and other Justices of the Court.

The importance of the questions involved in this case, and the ability with which they are discussed, are such, that no apology is deemed necessary for devoting to them the space they occupy.—*R.P.*

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VICTOR PROSPER CONSIDERANT v. ALBERT BRISBANE.

1. A written instrument, whereby the defendant promised "to pay to V. C., as executive agent of the company—Bureau, G., G. & Co.—the sum of \$5000," is legally payable to the company represented by V. C., and not to V. C., the agent.
2. Under the provisions of a statute, which requires that all actions shall be brought in the name of the real party in interest, V. C., the agent, cannot maintain an action in his own name, upon such an instrument, to recover the sum agreed to be paid.
3. The proviso in such statute, which authorizes the trustee of an express trust to sue in his own name, and defines such trustee as one "with whom, or in whose name a contract is made for the benefit of another," does not enable V. C. to sue in his own name upon such an instrument. The contract, in such case, is not, in a legal sense, made in the name of V. C., nor with him.
4. The consideration of such promise, being stated in the instrument in these words: "for which I am to receive stock of the said company, to the amount of \$5000," indicates that the company is the real party to the contract, entitled to receive the money, and by whom the stock is to be delivered.
5. If, upon the face of the note, it were deemed doubtful whether the contract was with V. C. personally, and the words describing him as executive agent, were not conclusive to the contrary; averments in the complaint that the company—Bureau, G., G. & Co.—is a corporation; that V. C. was, in making the contract, acting as the agent, and as such was authorized to receive subscriptions to the stock of the corporation; and that the defendant authorized him to subscribe the name of the defendant in the company's books, as an original subscriber; and that the defendant executed the instrument for the payment of the sum named for the shares so taken by the defendant in said company; show, conclusively, that the contract was made, by the defendant, with the company, and that the defendant's promise to pay is, legally, a promise to the company, which alone is interested therein. For this reason, therefore, also the agent V. C. cannot maintain the action.
6. In judgment of law, the acts of a mere agent, (not shown to have any interest in the subject,) done avowedly for the principal, and on his behalf, and by his authority, are the acts of the principal only; and contracts made with the agent, in such representative capacity, are contracts with the principal, and not with the agent.
7. In such case, the agent is not personally liable upon the contracts, and he cannot maintain an action thereon in his own name.

(Before DURR, Ch J., and BOSWORTH, HOWMAN, SLOSSON and WOODWARD, J. J.)
Heard, Dec. 19th, 1857; decided, Feb. 6th, 1858.

THIS action came before the Court, upon an appeal, by the defendant, from an order made at Special Term, before Mr. Justice

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Slosson, overruling a demurrer to the plaintiff's amended complaint. The complaint was in the following words:—

"The plaintiff, for an amended complaint in the above entitled action, by Francis H. Dykers, his attorney, complains of the defendant, and avers—

"*First.*—That the said defendant, on or about the 1st day of March, 1855, at the City of New York, applied to the said plaintiff, acting as the executive agent, and as such agent, authorized to receive subscriptions to the stock of the European and American Colonization Society, in Texas, a corporation duly created by, and existing under the laws of Belgium, in Europe, and of which said corporation, the business name is Bureau, Guillon, Godin & Co., and authorized said plaintiff to subscribe the name of the said defendant in the books of the said company as an original subscriber for the stock of said company, known as premium stock, to the amount of \$10,000, which said plaintiff then and there undertook, and faithfully promised to do.

"*Second.*—That the said defendant then and there made and executed, in writing, two subscription notes or contracts, for the payment, in the aggregate, of the sum of \$10,000, for the shares so taken by said defendant, in said company, which said notes were in the words and figures following, to wit:—

"(1)
" \$5000.

New York, March 1st, 1855.

"On the first day of July, 1856, I promise to pay to V. Considerant, as executive agent of the company—Bureau, Guillon, Godin & Co.—the sum of five thousand dollars, for which I am to receive stock of said company, known as premium stock (*actions a prime*), to the amount of five thousand dollars, value received.

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"(2)
" \$5000.

New York, March 1st, 1855.

"On the 1st day of September, 1856, I promise to pay to V. Considerant, as executive agent of the company—Bureau, Guillon, Godin & Co.—the sum of five thousand dollars, for which I am to receive stock of said company, known and designated as premium stock (*actions a prime*), to the amount of five thousand dollars.

"A. BRISBANE.

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"*Third.*—That said defendant thereupon delivered both of said notes to this plaintiff.

"*Fourth.*—That said plaintiff, acting as such executive agent, and under and by virtue of the authority vested in him by said defendant, duly caused the name of said defendant to be entered in the books of the said company, at Brussels, in Belgium, for the amount of stock so subscribed for by him, and caused certificates, in the usual form issued by said company, to be issued in the name of said defendant.

"*Fifth.*—That this plaintiff has always been ready and willing to deliver, to said defendant, the certificates of said company of the share or interest so subscribed for, by said defendant as aforesaid, or intended so to be, (and, on the maturity of each of said notes, caused the same to be tendered to the said defendant,) on the payment by said defendant of the sum agreed to be paid by him for the same, and said plaintiff is still ready and willing so to do, but said defendant has hitherto wholly neglected and refused to pay the same, so agreed to be paid by him as aforesaid, and still wholly neglects and refuses so to do; to the damage of this plaintiff of \$10,000 and upwards.

"Wherefore said plaintiff demands judgment against said defendant, for the sum of \$10,000, with interest on \$5000 from the 3d day of July, 1856, and interest on \$5000 from the 4th day of September, 1856, besides the costs of this action."

To this complaint, the defendant demurred, and the demurrer being overruled, and the complaint held sufficient at Special Term, he appealed to the General Term.

William B. Leeds, for the defendant (appellant).

The action (if any is maintainable) should have been brought by, and in the name of the corporation—Bureau, Guillon, Godin & Co.

The contract, as set forth in the complaint, was made between the company and the defendant. The words, "as executive agent," or words of official, and not of personal description. A promise to pay V. C., executive agent, etc., may mean no more than V. C., merchant or mechanic. But a promise to pay V. C., as executive agent, etc., is a promise to him in his official or rep-

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resentative capacity, and enures to the corporation, whose officer or agent he is, and leaves no right of action for the breach thereof, in the plaintiff. (*Bayley v. The Onondaga County Mutual Ins. Co.*, 6 Hill, 476; *Taintor v. Prendergast*, 3 Hill, 72; *Buckbee v. Brown*, 21 Wend. R. 110; *Brockway v. Allen*, 17 Wend. R. 40; *Safford v. Stevens*, 2 Wend. 158; *Gilmore v. Pope*, 5 Mass. R. 491; *Bowen v. Morris*, 2 Taunton R. 374; *Piggott v. Thompson*, 3 Bos. & Pull. 147, 150; *Sargent v. Morris*, 3 Barn. & Ald. 277; *The Inhabitants of Garland v. Reynolds*, 2 App. 45; *Irish v. Webster*, 5 Greenleaf R. 171; *Commercial Bank v. French*, 21 Pick. R. 486; *Taunton and South Boston Turnpike v. Whitney*, 10 Mass. R. 327; *Arlington v. Hinds*, D. Chipman R. 431; *Middlebury v. Case*, 6 Vermont R. 165.)

The plaintiff was not personally bound by the contract set forth in the complaint. (*Bank of Genesee v. Patchin Bank*, 3 Kernan, 318; *Babcock v. Beman*, 1 Kernan, 200; *Watercitt Bank v. White*, 1 Denio, 608; *Brockway v. Allen*, 17 Wend. 40; *Randall v. Van Vechten*, 19 John. R. 60; *Hall v. Huntoon*, 17 Vermont R. 244; *Many v. Beekman Iron Co.*, 9 Paige, 188; *Evans v. Wells*, 22 Wend. R. 825; *Kirkpatrick v. Slainer*, 22 Wend. 244.)

If the words, "as executive agent," etc., in the contract, set forth in the plaintiff's complaint, show that it was the intention to bind the corporation for the performance of the contract, and not the executive agent as an individual; why do not the same words show that it was also the intention that the obligations of the defendant should enure to the corporation, and not to the executive agent, as an individual?

But even if the words, "as executive agent," etc., in the promises of the defendant, are construed to be words of mere description, and not of substance, yet the plaintiff cannot maintain this action, because it appears, upon the face of the complaint, that the consideration of the contract proceeds from the company—Bureau, Guillon, Godin & Co.—a corporation, and the plaintiff is a mere naked agent or officer of the corporation, not bound by the contract, and with no beneficial interest in it. (*Sailly v. Cleveland*, 10 Wend. 156; *Safford v. Stevens*, 2 Wend. 158; *Taintor v. Prendergast*, 3 Hill, 72; *Hall v. Huntoon*, 17 Vermont R. 244.)

This action must be governed by section 111 of the Code, unless the exceptions enumerated in section 118 apply. A trustee

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of an express trust, as defined in section 118 of the Code, is construed to mean "a person with whom, or in whose name a contract is made for the benefit of another." This means a person who contracts as principal, or in whose name a contract is made as principal, (the other party to the contract accepting an obligation from him, and contracting an obligation to him,) for the benefit of another. It cannot mean a mere naked agent or officer, who is not bound by the contract, is not beneficially interested in it, and furnishes no part of the consideration for it. (2 Sand. 706.)

To entitle the plaintiff to recover, the contract must have been made by him or in his name.

If it was made by him, or in his name, he is a party to the contract.

And if a party to the contract, he is bound by the contract.

But the plaintiff is not bound by the contract, (see cases above cited.)

The company—Bureau, Guillon, Godin & Co.—by their executive agent, engage to make the defendant an original subscriber to their stock to the amount of \$10,000; this makes them the party of the first part. The defendant agrees to pay therefor the sum of \$10,000; this makes him the party of the second part. But the defendant agrees to pay this \$10,000 to the plaintiff as executive agent of the company. Does this engagement make him a party to the contract, within the meaning of section 113 of the Code? If the contract is made by him, what does he agree to do? or what is agreed to be done in his name? The agreement of the defendant to pay to the plaintiff, as the executive agent of the company, \$10,000, is an agreement to pay the company \$10,000 (see the authorities cited above).

Francis H. Dykers, for the plaintiff, (respondent).

The only question is, whether the action is properly brought in the name of Considerant, the plaintiff.

I. The objection being that the contract, which is the basis of this action, was virtually made with the company, and not with the plaintiff, the demurrer should have been "for want of legal capacity in the plaintiff to sue," and not for insufficiency of facts to constitute a cause of action.

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II. But, in any view of the case, the objection is not well founded. Section 113 of the Code says "a trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. Plaintiff has executed his part of the contract and has tendered the stock.

III. The language of the contract here is, "I promise to pay V. Considerant as executive agent of," etc.

If the language "as executive agent," is not a personal description, it is, at best, the description of the capacity in which he acts.

It is, therefore, a contract with the plaintiff and in his name, but in a particular capacity, which capacity shows that the contract is for the benefit of another.

IV. If the case is clearly within the statute, the Court will not ask for any other reason why the statute should apply.

Although the action might have been brought in the name of the company, under section 111 of the Code, yet it is properly brought here in the name of the plaintiff.

The order at Special Term should be affirmed with costs. (See *Erickson v. Compton*, 6 How. Pr. R. 471; *People v. Norton*, Court of Appeals, but not reported—referred to in note "A," sec. 113 of 5th ed. of Code; *Burbank v. Beach*, 15th Barb. 326; *Moss v. Livingston*, 4 Coms. 208; *Davis v. Garr*, 2 Seld. 124, 133.)

BY THE COURT. WOODRUFF, J.—Our statute now provides that every action must be prosecuted in the name of the real party in interest, (Code, § 111,) except as provided in section 113, which declares that an executor or administrator, or a trustee of an express trust, or a person expressly authorized by statute may sue, without joining with him the person for whose benefit the action is prosecuted; and, by way of definition, it is added, that "a trustee of an express trust shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another."

The question before us, and, as we think, the only question, is whether, upon the facts stated in the complaint, the plaintiff is a trustee of an express trust, or, in the words above cited, whether, upon the complaint, the plaintiff appears to be a person with whom, or in whose name, the contract set forth was made.

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He is named in the contract; but is the contract, in a just legal sense, made in his name?

And is the contract made with him, or in legal effect, with the corporation for which he was the agent?

In judgment of law, the acts of a mere agent done openly and avowedly for his principal, and on his behalf and by his authority, are the acts of the principal only, and the contracts so made are the contracts of the principal. No liability is thereby incurred by the agent, and no rights are acquired by him.

And hence the general doctrine, that a merely naked agent cannot sue in his own name upon the contracts which he makes for his principal, or which are made through his agency.

But he may contract in such wise as to bind himself personally, and acquire the correlative right to enforce the contract; in which case, although he have no interest whatever in the subject, except what arises out of the contract itself, he may maintain an action thereon. By entering into the personal obligation, he acquires an interest in the contract, and ceases to be the mere agent of his principal.

So in numerous cases, usually spoken of as exceptions to the general rule; as where the principal is not disclosed, in which case the agent does, in fact, bind himself, and so becomes interested in the contract, and acquires the right to enforce it.

So as to an auctioneer, an insurance agent effecting an insurance in his own name for the benefit of another, and a commission merchant, or factor, or a person having a lien upon, or special property in, the subject of the contract. They have long been held entitled to sue upon contracts made by themselves for their principals. By the usages of trade, and in general, because they have an actual interest in the contract itself, or are themselves bound for its performance, they are permitted to sue in their own name for its enforcement.

But clerks, servants and agents generally, selling goods or property for their known principals, and not undertaking themselves for the performance of the contract, have no interest therein, and cannot sue thereon. And yet it is obvious that, if the mere form of words spoken be attended to, millions of property are verbally sold by merchants' clerks, acting in the known exercise of their authority as clerks, in which the name of the principal is not, in

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terms, mentioned, and in which the whole form of negotiation and promise is in the first and second person.

In regard to verbal contracts, we apprehend that no great doubt or embarrassment can arise. When the agent acts purely and professedly as the mere agent of another, words of promise or undertaking, by or to the agent, will be taken as by or to the principal, whether his name be used or not; the agent will be taken to act in a representative character, and so the words employed will be construed as, in legal effect, used by or to the principal in his proper person.

And this will be the sole effect and operation of such a contract, unless the agent has an interest in the subject of the contract, or by express terms undertakes to bind himself in his individual or personal capacity, and so acquires an interest in the contract itself.

And when the contract is in writing, if it appear on the face of the contract, that, although named therein, he is mentioned only in respect of his official or representative character, and not as promisee individually, the promise will not be deemed made to him. When the promise is made to him by his name, without further designation or qualification, purporting to be a contract with him personally, he may sue thereon: the contract is, in every just sense, made with him. When he is designated by name, with the addition of terms of office, or agency, which are merely descriptive of the person, the contract may still be taken to be with him.

But when the terms are such, as clearly import that the party represented is the intended recipient of the subject of the promise, and the designation of the name of the agent is qualified by terms expressive of the capacity or relation which he bears to such recipient, then the contract is not, in a legal sense, with, nor in the name of the agent.

In short, where the agreement is in writing, it must appear that the agent is himself a party to the contract.

We need hardly specify examples of promissory notes given to agents, by name, without other terms of description; or promissory notes given to one who, though named, has the word cashier, or trustee, or treasurer, added to his name. Numerous similar examples are to be found in the books; and although there is not entire harmony of decision, it may, we think, be taken as set-

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tled, that where the promise is in the form of a promissory note, if it be drawn in terms to the agent by name only, or if the designation annexed be words of description only, it may be treated as made with him and in his name, and he may sue thereon.

But where, on the face of the note, it is his official character which was alone in the mind of the promisor, and contemplated in the promise, the effect is otherwise; as, when the promise was to pay "to the treasurer," etc., the plaintiff, though in fact treasurer, could not sue, or where the promise was to pay to the cashier of a designated bank, and so of similar cases collected in Paley on Agency, (part 4, chap. 5, and notes to Dunlap's ed. 1847,) and Story on Agency, (§ 160, § 160a, §§ 401, 418–429,) in treating of this subject.

And the cases most strikingly like the present are in the precise class last defined, in which the promise shows, on its face, that the agent, though named, is named in a capacity or relation that excludes the idea that the promise is made to him personally.

They are a note given to one as "town treasurer," or to a "town treasurer and his successors in office."

With these general observations, upon the right of an agent to sue, upon principles recognized before the Code, we observe, further, that where a contract was, in legal effect, made with the principal, in such sense, that the agent could not sue thereon, the contract could not be said to be made with the agent.

And where, though his name was contained in the contract, it was accompanied by such a designation of the official or representative character in which he was named, as promisee, that the promise was, in judgment of law, taken to the principal, and not to himself, then, and in such cases, the contract could not be said to be made with his name.

These views, we think, are sustained and established by numerous cases, and among them, from our own State, see *Harp. v. Osgood*, (2 Hill, 219,) *Taintor v. Prendergast*, (3 Hill, 72,) *Bayley v. The Onondaga Co. Mut. Ins. Co.*, (6 Hill, 476,) *Grinnell v. Schmidt*, (2 Sand. S. C. R. 706,) *Union Ind. R. Co. v. Tomlinson*, (1 E. D. Smith, R. 364,) and cases cited, among which, bearing most directly upon the point now under consideration, are *Piggott v. Thompson*, (3 Bos. & Puller, 147,) and *Bowen v. Morris*, (2 Taunt. 374;) and see, also, *Sargent v. Morris*, (3 Barn. & Ald. 277,) *Gil-*

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more v. Pope, (5 Mass. 491,) reaffirmed in *Taunt and So. Boston Turnpike Co. v. Whiting*, (10 Mass. 336.)

We must assume, that the Legislature, in declaring what the terms "trustee of an express trust" should include, made use of language with a view to its known legal signification.

That they intended, that when the question arose—with whom is the contract in question made? we should answer it in the light of past adjudication, and if the answer in this particular case, is, with the principal, and not with the agent; then, the agent is not a trustee of an express trust, within the definition. And so, if the contract only refers to the agent for the purpose of defining the capacity in which he acts, and not for describing his person, as in the cases above suggested, in which the promise is taken, to the principal directly; then the contract is not, in a legal sense, made in his name, and again, he is not a trustee of an express trust, within the definition.

If these views are correct, the demurrer, in the present case, is well taken. The contract, declared on, does not import, that the plaintiff has any interest in the subject matter of the contract—nor in the contract itself—nor that he is in anywise bound for, or will be benefited by its performance; it imposes upon him no duty; the promise contained in it does not purport to be made to him personally—it is precisely like a promise to one, "as town treasurer," already referred to—it is, therefore, a contract, not with him, but with his principal, and for the reasons already mentioned, it is not, in a legal sense, in his name—it is only in his character as agent, and not in his name as a person, that the contract is made.

If there was any thing to be performed to the defendant, it was not by the agent. This is, we think, quite apparent. Had the contract been subscribed by the plaintiff, in terms, "as such executive agent, etc., " it would have been no more, and, we think, no less obvious, that the stock which the defendant was to receive, was to be issued to him by the corporation represented, for the purposes of the contract, by the plaintiff.

In this aspect of the case, the contract was between the defendant and the corporation: the defendant was to pay his subscription notes, and the corporation were to issue to him stock for the amount thereof.

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And we feel no hesitation in saying, that, upon issuing and tendering to him the stock, the corporation could maintain the action on his promise; and, we think, that upon the principles above suggested, the plaintiff, the merely naked agent of the corporation, cannot.

If there was any room for doubt upon the question, whether, upon the face of the notes sued upon, any implied obligation could arise, if unexplained, binding the plaintiff to deliver the stock, and so giving to him such an interest in the contract as might enable us to treat it as made with him, the pleader seems to us to have carefully excluded any such possible implication, or any construction other than that the plaintiff is the naked agent of the corporation, by the other averments of his complaint.

He avers, that the defendant applied to the plaintiff, acting as agent, and, as such, authorized to receive subscriptions, and authorized to subscribe the defendant's name in the books of the company, as a subscriber for the stock; that the notes were subscription-notes, made and given for the shares taken by the defendant in the company; that the plaintiff, as such agent, caused the defendant's name to be entered in the books of the company, as a subscriber, for the amount designated, and caused certificates, in the usual form, to be issued by the company to him. The promise of the defendant being, to pay to the plaintiff, as such agent, completes a transaction in which, as it seems to us, the whole consideration, and the whole obligation and duty, are, as matter of law, between the defendant and the corporation, respectively and reciprocally; that the plaintiff is in no sense a trustee, or any thing but the mere instrument through whom an immediate and direct legal title passed to the corporation, which he represented as their naked agent, not acting or professing to act in his own name.

The order appealed from must be reversed, and judgment ordered for the defendant, on the demurrer; but with leave to the plaintiff to amend, within twenty days, on payment of costs. Costs of the appeal may abide the event of the suit.

Ordered accordingly.

Ehlen v. Rutgers Fire Ins. Co.

JOSEPH EHLEN, Plaintiff and Respondent, *v.* THE RUTGERS FIRE INSURANCE CO., Defendants and Appellants.

1. When, in an action upon a policy of insurance against loss or damage by fire, the answer admits a loss, but not to the amount claimed, and sets up grounds of defence, and a referee is ordered, "only to ascertain and determine the amount of any loss sustained by the plaintiff, for the recovery of which such action is brought," and such referee executes the order and reports the amount of such loss, and, on a subsequent trial of the action, his report is read in evidence without objection, and a verdict passes for the plaintiff; the defendant, on an appeal from the judgment, cannot review the accuracy of the referee's decision, as to the amount of such loss, nor in respect to the admission or rejection of evidence, on the proceedings before him, as such referee.
2. It seems that the report might have been excepted to, and reviewed on a special motion.

(Rule 83, of the Rules adopted in August, 1855, prescribes the mode of reviewing such a report.)

(Before HOWMAN and PERRINE, J. J.)

Heard, January 26; decided, February 6, 1856.)

THE plaintiff brings this action upon a policy of insurance dated the 29th of September, 1854, by which the defendants insured the plaintiff against loss or damage by fire, in respect to certain property described in the policy. The complaint states the execution and delivery of the policy, its date and terms, and alleges a loss by fire, the performance by the plaintiff of all the conditions, on his part, contained in the policy, and prays judgment for \$600, the whole sum insured, with interest and costs.

The answer, among other things, admitted a loss, but alleged that it did not exceed \$40. There was served, with the answer, a written offer, that the plaintiff might take judgment for \$325 and costs.

The action being at issue, it was, by an order of the Court, dated the 15th of December, 1855, referred to A. J. Perry, Esq., as sole referee, "only to ascertain and determine the amount of any loss sustained by the plaintiff, for the recovery of which this action is brought."

The referee made a report, dated the 2d of August, 1856, which

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contained the testimony taken, and proceedings had before him on the reference, and in said report, reported, "that 'the amount of the loss sustained' by the plaintiff, for the recovery of which this action is brought, is the sum of four hundred and one dollars and seventy-four cents."

The action was tried on the 11th of February, 1857, before Mr. Justice Woodruff and a jury. On the trial, it was admitted, that a fire occurred, as alleged in the complaint, and that the requisite preliminary proofs were furnished in due season. The plaintiff then read, in evidence, the application for an order of reference; the order of reference to Mr. Perry, and his report as such referee. No objection was made to the reception of either of these items of evidence, to establish the amount which the plaintiff was entitled to recover, if he was entitled to any recovery herein.

The defendants then introduced witnesses to establish certain grounds of defence, stated in their answer, which, if established, would show that the defendant was not entitled to recover at all, under the policy.

The printed case, after stating the proceedings had, and evidence given on the trial, adds, "that the case was then submitted to the jury, who found a verdict for the plaintiff for the sum of \$457.98, (amount of report of referee and interest,) to set aside which verdict this case was made."

The case contains no requests to charge, nor exceptions to the charge made, nor does it state what charge was made.

Judgment was entered in favor of the plaintiff, for the amount of the verdict, with costs; and the defendant appealed from the judgment, to the General Term, by a notice of appeal, dated February 18, 1857.

On the 20th of February, 1857, the defendants' attorney served on the plaintiff's attorney a notice, (exclusive of its title,) in these words, viz. :—

"Sir,—Please to take notice, that the defendants herein except to the report of A. J. Perry, Esq., referee, as follows:—

"1st. That they except to the finding, that the damage to the 625½ pairs of window-shades by the fire, is the sum of \$248.66.

"2d. That they except to the finding, that the amount of the loss sustained by the plaintiff, for the recovery of which this action is brought, is the sum of \$401.74.

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"3d. That they except to so much of the finding of the referee as relates to damage of window-shades, upon the ground that the plaintiff had no insurable interest in such window-shades. That he suffered no damage to such window-shades, and that he had no such interest in said shades as was insured in the policy upon which this suit is brought.

PEET & NICHOLS,
Deft's Att'y."

"February, 20, 1857.

C. A. Nichols, for the appellants, insisted upon his right, on this appeal, to have the matters enumerated in his exceptions, contained in the paper of the 20th of Feb., 1857, considered by the Court at General Term, and also his right to review exceptions, taken by him to decisions of the referee, in excluding and admitting evidence on the proceedings had before such referee.

C. A. May, for respondent.

BY THE COURT. PIERREPONT, J.—This is an appeal from a judgment against the defendants, entered upon the verdict of a jury.

On the 15th of December, 1855, at Special Term, an order was made in this action, that it "be referred to A. J. Perry, Esq., of the city of New York, counsellor-at-law, as sole referee, only to ascertain and determine the amount of any loss sustained by the plaintiff, for the recovery of which this action is brought."

In August, 1856, the referee made his report, finding the amount of the loss to be \$401.74.

The cause was tried in February, 1857. Upon the trial, the referee's report was read in evidence, together with proofs of the fire, etc. The jury found for the plaintiff the amount reported by the referee. Upon their verdict, judgment was entered, Feb. 15th, 1857. On the 20th of the same month exceptions were filed to the referee's report. The evidence taken on the reference is printed in the case, though it does not appear to have been before the Court at the trial. The defendants now seek, at General Term, on appeal from the judgment, to review the referee's special report. This is not correct practice. The time to object to the report was before it was read to the jury; it might have been excepted to, and reviewed on special motion. The Code

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(sec. 489) provides that the rules and practice of the Court in civil actions, not inconsistent with this Act, shall continue in force, subject to the power of the respective Courts.

The mode which the Code prescribes for reviewing the report of a referee, upon an appeal from the judgment entered on it, is not applicable to a special report of this kind.

None of the exceptions taken to the ruling of the Judge on the trial were well taken, and upon them them the counsel seemed to place no reliance.

The judgment must be affirmed with costs.

Affirmed accordingly

EDGAR M. BROWN v. ELISHA E. MORGAN, JOHN GRISWOLD,
EDWARD G. TINKER and others.

1. Under a contract for the building of a vessel, the ownership continues in the contractor until the vessel is completed and delivered to the party for whom she is built.
2. The same rule applies where the contract limits the building to "the hull, spars, top iron work and cabin," for a sum specified, "payments to be made as the work progresses."
3. When a ship is built by the contractor, under such an agreement, the party for whom she is built, is not responsible to a third person for materials, or articles used in the construction of the hull of the ship, which, by the contract, the contractor was bound to provide and use therein.

(Before HOFFMAN and PIERREPOINT, J. J.)

Heard, Jan. 11th; decided, Feb. 18th, 1858.

THIS action comes before the Court at General Term, upon questions of law, arising at the trial, which were there ordered to be heard, in the first instance, at the General Term.

The cause was tried on the 17th and 18th day of December, 1856, and, at the close of the plaintiff's testimony, the complaint was dismissed. The only exception which the case presented for consideration, material to the review had in the General Term, was the plaintiff's exception to the order of the Court dismissing the complaint.

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It would seem, from the opinion of the Court at General Term, that the Court deemed the following facts established by the testimony, viz.:—

That, on the 20th of May, 1854, the defendant John Griswold entered into a contract with Jacob A. Westervelt, ship-builder, which was expressed in writing, as follows:—

“NEW YORK, 20th May, 1854.

“Mr. John Griswold: Sir,—I offer to build the hull, spars, top iron work, and a cabin forty feet long, of a ship of the following dimensions, viz.: Two hundred and five feet keel; forty-one feet beam, moulded; twenty-eight feet deep; to have three entire decks; the materials and workmanship to compare favorably in all respects, as well in quality as quantity, with the best modern ships I have heretofore built for the London line of packets or other ships, for the sum of seventy thousand dollars: payments to be made as the work progresses. Respectfully yours,

“(Signed) JACOB A. WESTERVELT.

“I accede to the above proposition.

“July 20th, 1854.”

JOHN GRISWOLD.”

During the progress of the work, the defendant Edward G. Tinker, who, on the completion of the vessel, became the captain or master thereof, was on board, exercising a supervision over the work, and giving directions in relation thereto.

The plaintiff is a brass and copper founder. Orders were given to his employee (his pattern-maker) to be at the ship-yard of Westervelt, to see Captain Tinker. By whom the orders were left, and by whose authority they were given, does not appear. The pattern-maker attended, took the dimensions, etc., under the orders of Captain Tinker, and various work was done, and materials were supplied by the plaintiff, which were used on the hull of the vessel.

He also furnished other copper work, as the building and completion of the vessel progressed, which was not used in or applied to the hull, but which was confessedly not within the contract of Westervelt.

The supervision and directions given by Captain Tinker are

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described by the witness thus: "He ordered the work done as captains usually order."

The work and materials were charged by the plaintiff to "the ship Palestine and owner," that being the name which the new vessel received.

As the work was, from time to time, delivered by the plaintiff, he took receipts for the goods delivered. These receipts were nearly all of them signed by the son and partner of the contractor, (J. A. Westervelt,) or by his foreman, or by other persons in the said Westervelt's employ.

One receipt was signed "J. A. W., for John Griswold;" one "J. A. Westervelt, for owners of ship Palestine;" one, "J. A. W.," without any addition, and one "E. G. Tinker."

The plaintiff's account, as entered in his books, amounted to £1708.22; and the first items were charged under date of Feb. 10th, 1854, and the last, August, 24th, 1854.

The whole bill was rendered, and became the subject of discussion between the defendant Morgan, (who, at that time, was acting for the defendant John Griswold,) and the contractor, Westervelt. Mr. Griswold refused to pay the whole bill, insisting that such of the work and materials as went into the hull of the vessel were not chargeable to him, nor ordered by him; that, in respect to any work or materials in the hull of the vessel, they were included in his contract with Westervelt; and that Captain Tinker's supervision, of the progress of the work, was only for the purpose of seeing that the work was properly done, as the contract required.

On behalf of Mr. Griswold, Capt. Morgan, on his examination of the bill, selected certain of the charges, viz.: "for yellow metal or coppering," which, it was conceded, were not embraced in Westervelt's contract, amounting to \$427.02, and for those the plaintiff was paid by John Griswold.

The vessel was built for John Griswold alone, the other defendants having no interest therein at the time. After her completion, the other defendants, respectively, purchased from John Griswold a share or part of the vessel.

John Griswold paid to Westervelt the whole amount due to him upon his contract, above set forth.

The residue of the plaintiff's account not being paid, the plain-

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tiff commenced this action, not only against John Griswold, for whom the ship was built, but against the other persons who afterwards purchased shares or parts thereof.

It was claimed on the trial, not only that neither of the defendants were liable, because the work and materials, not paid for by Griswold, went into the hull of the vessel, and were embraced within Westervelt's contract; and that he, Griswold, never purchased or ordered any of them, nor authorized their purchase on his account or credit; but that the other of the defendants had no interest at all at the time, and were not liable; and also, that the action being joint, no recovery could be had, in this action, even if Griswold could be held liable.

The complaint was dismissed, and the questions of law were ordered to be heard at General Term, as above stated.

James W. Gerard, for the plaintiff.

Wm. M. Evarts, for the defendants.

BY THE COURT. HOFFMAN, J.—There is no evidence in the case, and none was offered, which would tend to render either of the defendants liable, except Tinker and John Griswold.

As to Griswold, there is no testimony of his ordering the articles, either personally or through an agent. There is no proof of the plaintiff intending to charge him, or furnishing the supplies upon his credit.

The contract between him and J. A. Westervelt brings the case within the authority of *Andrews v. Durant*, (1 Kernan's Rep. 35.) The ownership of the vessel was in Westervelt, until she was completed and delivered.

It is true, that this contract did not comprise the construction of the whole vessel; it did embrace the hull, spars, top iron work and cabin. All the materials sued for went into the hull.

There may arise a case, in which a building contract is limited to so small a part of the vessel as to create an exception to the rule of *Andrews v. Durant*, as where the materials could not have been employed in the portion embraced in the contract; but, whatever be the rule to be adopted in such a case, the present is

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not of that character. The materials furnished went into the hull, which Westervelt was to build.

His own opinion, therefore, that they were not to be supplied by him within his contract, is immaterial, and his opinion is counterbalanced by that of Captain Morgan.

We consider it to be clear, that no case has been made out against the defendant Griswold.

As to the defendant Tinker, he was neither owner nor master, nor was the credit given to him, nor did the plaintiff ever indicate, until suit brought, an intention to charge him. Indeed, the testimony only proves that he directed where the materials were to be used, their size and fitting—not that he ever ordered them.

The plaintiff has failed to make out a case against either of these defendants. It is needless, therefore, to consider the point raised by the defendants' counsel, that the misjoinder of the other defendants, against whom there was not the least evidence, justified a nonsuit as to all. We apprehend, however, that he is wrong, and that a joint action against any number may be sustained upon the evidence, as to one or more, and fail as to the rest. (1 Kernan, 294; 5 Duer, 828; 15 Barbour, 524.)

The judgment will be for the dismissal of the complaint with costs.

FIELDINGS, Plaintiffs and Appellants, v. J. T. MILLS, Respondent.

1. When a mechanic, in the course of his business, makes repairs, upon an agreement to give credit for a stipulated time, he has no lien upon the article so repaired for the value of such repairs. If the person, for whom they are made, becomes insolvent, before the article, so repaired, goes out of the possession of the mechanic, the latter cannot assert a lien on account of such intervening insolvency.
2. There is a marked difference, in some respects, between the right of stoppage, *in transitu*, and that of a mechanic to detain. Insolvency alone creates the former. The common-law right of a mechanic to detain, arises and exists, as well, against a solvent as an insolvent employer. Neither the solvency nor the insolvency of the latter can be deemed an element in the creation of the right of lien which exists in favor of the mechanic.
3. When a defendant, before answering, serves an offer that the plaintiffs may take judgment, for a sum named with costs, which offer is not accepted, and

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subsequently puts in an answer which not only controverts the amount due, upon the plaintiffs' cause of action, but sets up a counter-claim, and the plaintiff recover the precise sum offered and a judgment that the defendant is entitled to nothing upon his counter-claim, they recover a more favorable judgment than that offered, and the defendant is not entitled to costs, as a matter of right, from the time of such offer.

(Before Bosworth & Woodbury, J. J.)

Heard, Dec. 7th, 1857; decided Feb. 27th, 1858.

IN this action, George and Robert Fielding are the plaintiffs, and J. Doremus Mills and John T. Mills are the defendants. It comes before the Court, at General Term, on an appeal by the plaintiffs from the judgment entered herein on the report of Stephen P. Nash, referee. It was commenced in September, 1855. The complaint states, in substance, *First*, that the plaintiffs are manufacturers of stages, under the firm of "Fielding Brothers." On the first of May, 1855, J. D. Mills sent to them six stages, or omnibuses—their licensed numbers being; 556, 557, 558, 559, 560 and 561—with orders to put them in complete repair, according to directions then given. They received them, and progressed diligently with the repairs, until the 11th of June, 1855, when J. T. Mills told them he had bought the stages, and to finish them; which they proceeded to do, until the 18th of June, 1855, when he told them he would not be accountable for further work or repairs, except upon the stage No. 561, which he ordered to be, and which they finished.

Second. When told on the 11th of June, 1855, by John T., that he had bought the stages, the value of the repairs done, including work and materials, was \$860—of that done after J. T. Mills ordered the plaintiffs to proceed, was \$324.88—making a total of \$1184.88.

Third. Since the 18th of June, 1855, plaintiffs demanded payment of the defendants of the \$1184.88, which they neglect and refuse to pay.

Fourth. The plaintiffs claim a lien on the stages for the whole amount, have offered to give them up on being paid, and have requested the defendants to take them and pay the bill.

Fifth. The plaintiffs cannot render their lien effectual without the aid of the Court, as one of equity. They ask a judgment that the defendants pay the \$1184.88, with interest from the 18th

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of June, 1855, and costs, by a day to be named, or in default thereof, that the stages be sold, and the proceeds applied to pay the same.

John T. Mills, before answering the complaint, served a written offer, dated the 22d of October, 1855, that judgment might be taken against him for \$276.38, with interest from the 18th of June, 1855, and the costs of the action, on condition that the plaintiffs delivered the stages to him. The plaintiffs did not accept the offer.

John T. Mills answered separately, by an answer, verified on the 19th of November, 1855, denying that he excepted stage No. 561, from any directions or declarations made on the 18th of June, 1855. The answer denies, that he ordered that finished; or that the repairs up to the 11th of June, were of the value of \$860; or that the value of those done at his request was \$324.38. It denies, that plaintiffs have any lien upon said stages, except for the value of the work done at his request. It then "denies all the allegations of the complaint, which are inconsistent with this answer." It then avers, that on the 11th day of June, 1855, J. T. and J. D. Mills called, together, on the plaintiffs, and told them J. T. Mills had bought the stages; and the plaintiffs then agreed to look to J. D. Mills for the value of the work then done, and waived any lien they had therefor, and thereupon J. T. Mills requested them to go on with the repairs as then specified, and charge the future work to him.

He never agreed to pay for the work done for J. D. Mills; and "it was solely in consequence of plaintiffs agreeing to look to said J. D. Mills, for the value thereof," that J. T. Mills ordered them to go on with the repairs; and otherwise, he would not have given said orders.

A few days after that, plaintiffs told him they did not intend to keep said agreement, and should claim and enforce their lien; whereupon he absolutely ordered them to desist from further repairs, and informed them, he would not be responsible for future repairs, which orders and conversations, are the same as those mentioned in the complaint, but there inaccurately stated.

Afterwards, and before suit brought, he applied to plaintiffs for their bill of work done at his request; offered to pay it, if they would give up the stages, and is now ready to do so. They

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neglected to furnish such a bill or to state its amount, and refused to accept his offer. It then states, by way of counter-claim, that, on the 11th of June, 1855, he was, and since has been, running a line of stages, and all the time needed those detained by the plaintiffs, and has suffered damage, by their refusal to keep their agreement or to give up the stages, to the amount of \$15 per day; and for the amount of such damage asks judgment.

It also asks judgment, that the complaint be dismissed and the stages be delivered to him, on his paying the value of the repairs done at his request, up to the time he ordered them to stop repairing—first deducting the damage to John T. Mills, by reason of their refusal to give up the stages; and if such damages exceed the value of such repairs, then a judgment against the plaintiffs, for the excess, with costs.

The plaintiffs replied to the answer, putting at issue its allegations constituting a counter-claim.

The action was referred to the referee, to hear and decide the whole issue therein. His report, exclusive of the title of the action and its recital, reads as follows, viz.:—

"That on or about the first day of May, 1855, the defendant, J. Doremus Mills sent to the factory of plaintiffs six stages, belonging to him, and employed them to put the same in repair, as particularly stated in the complaint; that plaintiffs received the said stages, and proceeded to repair the same, until the 11th day of June, 1855, when they were notified, by the defendants, that the said John T. Mills had purchased the said stages from the said J. Doremus Mills; that thereupon the said J. Doremus Mills directed the price of the work already done to be charged to him; and the said John T. Mills employed the plaintiffs to proceed with the work on said stages, which they did, until the 18th day of June, 1855, when the said John T. Mills directed the said work to be stopped; that the value of the work and repairs done on the said stages, prior to the sale of the same to the defendant John T. Mills, was eight hundred and sixty dollars; that the said work was done for J. Doremus Mills, upon a credit of four months; that the value of the work done, subsequent to the sale to the defendant John T. Mills, was \$276.38, and said work was done without credit to be given therefor; that the plaintiffs did not, on the 11th of June, 1855, or at any other time after the sale

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of said stages by him, agree to look to J. Doremus Mills for the value of the repairs then done upon them, and waive any lien they might have had upon them; that on or about the first day of September, 1855, and before the commencement of this action, the defendant John T. Mills demanded the possession of said stages, stating his readiness to pay the amount of such repairs as had been done at his request; that the plaintiffs claimed to retain the said stages, and declined to furnish said defendant with a bill of said last-mentioned repairs, distinct from the other repairs which had been put upon said stages; that on the said 11th day of June, 1855, when the plaintiffs were informed of the sale of said stages, said J. Doremus Mills was insolvent, and on that same day made a general assignment for the benefit of his creditors, of which the plaintiffs were informed before the said 18th day of June, 1855, when the said work was stopped; that the plaintiffs have furnished standing-room and storage for the said stages, since the said work was stopped, and that the value of such storage, up to the date of this my report, is two hundred and eighty-eight dollars.

"And I further report, that I find and decide, as matter of law, that the plaintiffs had not, at the time this action was commenced, any lien upon the stages mentioned in the complaint, for the work and repairs done upon them for the defendant J. Doremus Mills, prior to the sale to the defendant J. T. Mills, although at the time of such sale, and before the completion of said work, the said J. Doremus Mills had become insolvent—such work having been done upon a credit of four months from its completion, to be given therefor.

"That the plaintiffs had a lien upon said stages, for the subsequent work done upon them, by direction of defendant John T. Mills.

"That the demand of said stages by said defendant, and his expressed readiness to pay for such work, was not a sufficient tender to discharge such lien, which, therefore, remained in full force when this action was commenced.

"That the plaintiffs are not entitled to recover in this action for the storage of said stages.

"That the defendant John T. Mills is not entitled in this action to recover any damages by way of counter-claim, as in his answer alleged.

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"That neither party in this action is entitled to costs, as against the other.

"And I, therefore, find and decide, that the plaintiffs are entitled to judgment in this action against the defendant John T. Mills, for the sum of \$276.88, with interest from the 18th day of June, 1855, amounting, at the date of this my report, to \$305.23; and that unless the said sum, with interest, be paid to the plaintiffs or their attorneys herein within fifteen days after the service of a copy of said judgment upon the attorney of said J. T. Mills herein, the said stages, or so many of them as may be sufficient for that purpose, be sold under the direction of this Court, and the proceeds applied to the payment of the amount so adjudged to the plaintiffs and the expenses of such sale; and on the payment of said sum, so adjudged to the plaintiffs, and the expenses of such sale, if the said stages be sold, the said stages, or such of them as shall not be sold under the said judgment, and the surplus proceeds of such as may be sold, shall belong and be paid, or be delivered to the said John T. Mills.

"All of which is respectfully submitted.

"Dated New York, Dec. 15th, 1856.

"S. P. NASH, Referee."

Judgment was entered, conforming to the report of the referee, except that it awarded to John T. Mills his costs of the action, from the time of service of such offer, on the ground, as recited in the judgment, that the plaintiffs had "failed to obtain a more favorable judgment" than that authorized by the offer. Under what circumstances, or by what authority this provision was inserted in the judgment, the appeal-papers did not disclose.

The plaintiffs filed and served, in due time, the following exceptions to the decisions of the referee:—

"*Exception 1.*—The counsel for the plaintiffs excepts to the said referee's conclusion of fact, that the work referred to was done for J. Doremus Mills, on a credit of four months.

"*Exception 2.*—The said counsel for plaintiffs excepts to the said referee's conclusion of law, that the plaintiffs had not, at the time this action was commenced, any lien on the stages mentioned in the complaint, for the work and repairs done upon them for the defendant J. Doremus Mills, prior to the sale to the defendant

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John T. Mills, although at the time of such sale, and before the completion of said work, the said J. Doremus Mills had become insolvent, such work having been done upon a credit of four months from its completion, to be given therefor.

“*Exception 3.*—The said counsel for plaintiffs excepts to said referee’s conclusion of law, that the plaintiffs are not entitled to recover in this action for the storage of said stages.

“*Exception 4.*—And the said counsel, in addition to the above exceptions to the said conclusion of fact and law, further excepts to so much of the judgment entered in this action, by which it is declared that the defendant John T. Mills, before answering, having served upon plaintiffs an offer in writing to allow judgment to be taken, as therein specified, with costs, and the plaintiffs not having accepted the same within ten days thereafter, or at all, and having failed to obtain a more favorable judgment, and by which it is adjudged that said defendant, John T. Mills, do recover of said plaintiffs eighty-seven dollars and nineteen cents for his costs, from the time of such offer, said costs having been duly adjusted at such an amount.”

James Humphrey, for appellants.

I. Admitting that there was a distinct express agreement between the plaintiffs and J. Doremus Mills—that this specific work should be done on a credit of four months from its completion—the lien of the plaintiffs was not thereby defeated, the said J. D. Mills having become insolvent during the progress of the work. The insolvency of the employer abrogates the contract for credit, and thus the lien remains unimpaired. 1. As a general rule, insolvency destroys all contracts to give credit, even of the most express character. 2. This principle is most frequently applied to contracts for the sale of goods: the vendor has a lien on the goods until payment, except when there is an agreement for a credit, which is inconsistent with the existence of a lien; but, where there is an express agreement for a credit, if the vendor becomes insolvent before delivery, the lien exists. (*Tooke v. Hollingsworth*, 5 T. R. 215; *Blaizam v. Sanders*, 4 B. & C. 941; *Blaizam v. Morley*, id. 951; *Cross Law of Lien*, 828.) This rule is even applied to cases where the insolvent vendor has made sub-sales,

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and been paid for them. (*Dixon v. Yates*, 5 B. & Adol. 313.) 3. The doctrine of stoppage, *in transitu*, is founded on the right of lien in the vendor, and illustrates the extent to which the principle contended for is carried, for the protection of the honest dealer. (2 Kent's Com. 5 ed. 540.) 4. There is no difference in principle between the case of a vendor of goods and that of a mechanic selling both his service and materials, or that of a manufacturer (as in this case) selling the money which he had paid to his workmen and his materials together. 5. The same rule has been applied in cases analogous to the present, wherever the question of intervening insolvency has been directly presented. (*Stevenson v. Blakelock*, 1 Maule & S. 535, which is distinguished from *Cowell v. Simpson*, on this precise point; *Abbot on Shipping*, 299; *Hutton v. Bragg*, 2 Marshall, 339, per Gibba, C. J.)

II. There was no express contract for credit in this case. At the commencement of the dealing between the parties, when Mills was in good credit, he was informed by plaintiffs "that work done for him would be on four months' credit; that they did not give any one longer time than that;" and, accordingly, when bills were rendered, notes were taken at four months. Nothing being said in this particular case, the contract for credit was implied from the former dealings. It must, therefore, be also implied, that the circumstances on which the former credit was based should remain the same. It was certainly implied that the dealer should not become insolvent. It cannot be presumed that a man ever agreed to give four months' credit to a bankrupt. The rule contended for, in case of an express contract to give credit, applies, with still greater force of reason, when the agreement is only implied.

III. Liens of this nature are in conformity with natural equity, and, as such, are favored in law. (*McFarland v. Wheeler*, 26 Wend. 480, per Verplanck, Senator; *Grinnell v. Cook*, 3 Hill, 491.)

IV. The fourth exception to the judgment is well taken, and the defendant J. T. Mills was not entitled to costs.

V. The plaintiffs should have judged for \$1136.38, with interest from 18th June, 1855, and costs, with the same provisions for the sale of the property as are contained in the present judgment.

J. M. Van Cott, for respondent.

I. The referee correctly found, that the work done prior to the 11th of June, 1855, for which the plaintiffs asserted a lien, "was done for J. Doremus Mills, on a credit of four months."

II. Upon the facts found, the alleged lien did not exist. 1. A contract for credit, is a contract to deliver without payment, and expressly negatives the right to detain till payment. 2. The plaintiffs' assent, to the sale to John T. Mills, executed the agreement to deliver without payment, and repels the idea of a lien. 3. The plaintiffs having sued before the repairs were completed, are obliged to bring forward, and rely upon such sale to excuse the omission to complete the work. (Story on Bailments, §§ 229, 441.) 4. The stages being held to make repairs for John T. Mills, the plaintiffs were required, by their agreement, to deliver them on being paid for such repairs. 5. There is nothing, in the insolvency of the previous owner, to create a lien for work done for him on a credit prior to the transfer to the present owner. (2 Kent C., 685–8, and notes. *Gilman v. Browne*, 1 Mason's R., 191; *Chandler v. Belden*, 18 J. R. 157; *Pinney v. Wells*, 10 Conn. R. 104; *Crawshay v. Homfray*, 4 Barn. and Ald. 50; *Lucas v. Nockells*, 4 Bing. 729; *Alsager v. St. Katharine's Docks*, 14 Mes. and Welsb. 794.)

III. The plaintiffs were not entitled to storage. 1. No basis is laid for it in the complaint. 2. The plaintiffs were not storekeepers. There is no contract, express or implied, to pay storage. There was no request to detain—but the contrary. They could not store, any more than they could insure, at the cost of the owner, to keep good the security of a lien. (9 M. and Wels. 675.)

IV. The evidence would well have justified a dismissal of the complaint, on the ground of the tender and the counter-claim. The judgment should be affirmed, with costs.

BY THE COURT. BOSWORTH, J.—The work done for J. D. Mills, was done on a credit of four months. He became insolvent before the work, which the plaintiffs undertook to do, was completed. The question presented by the appeal, in the present case, is this:—Have the plaintiffs a right to retain the stages until

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the amount, owing for the work done and materials applied in repairing them, is paid?

It is clear that they have not, if they must abide by the terms of the contract, under which the labor was performed and the materials furnished were supplied.

They must abide by their contract, unless the insolvency of J. Doremus Mills, occurring before the delivery of the stages, puts an end to the agreement, and leaves all the parties to it in precisely the same position as if no agreement for credit had ever been made.

The right of a mechanic to detain the property of his employer until he is paid for the labor done, and materials used, in repairing it, grows out of the usages of trade.

It seems to be well settled, in respect to a common carrier, that no such right exists, when the transportation of the goods was undertaken, upon an agreement which fixes the time of payment of the freight to a day subsequent to that on which, by the terms of the agreement, they are to be delivered.

The fact, that the shipper becomes insolvent while the goods are in transit, or before they are delivered, does not absolve the carrier from his agreement as made, nor authorize him to detain the goods until the freight is paid. (*Crawshay, et al., v. Homfray, et al.*, 4 Barn. & Ald. 47; *Alsager v. St. Catharine's Docks*, 14 Mee. & Welsb. 794; *Pinney v. Wells*, 10 Conn. 104; *Chandler v. Belden*, 18 J. R. 157.)

We can perceive no reason why the common-law right of lien, which exists in favor of the carrier, should not be regarded as favorably as any other that grows out of the usages of trade. If insolvency of the shipper, occurring before the delivery of the goods, will not authorize the carrier to detain them for freight, in a case in which he agreed to give credit for it, until a day subsequent to that on which the goods were contracted to be delivered, it is difficult to assign any reason, why a different rule should be applied in the case before us, in consequence of the insolvency of J. Doremus Mills.

There is a marked difference, in some respects, between the right of stoppage, *in transitu*, and that of a mechanic to detain. Insolvency alone creates the right to stop, *in transitu*. The common-law right of the mechanic to detain, arises as well against a

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solvent as an insolvent employer. Neither the solvency nor insolvency of the latter can be deemed an element in the creation of the right of lien, which exists in favor of the mechanic. No lien exists in favor of the latter, when his services are performed upon an agreement, that payment for them is not to be made until after the article which they have improved is to be delivered.

It follows, if these views are correct, that the referee was right in holding that the plaintiffs had no lien upon the stages for the work and repairs done upon them for J. Doremus Mills.

We think he has no right to recover in this action for the storage of the stages. J. T. Mills demanded possession of them, and offered to pay for the work and repairs done upon them at his request.

The referee decided that neither party should recover costs as against the other. That decision, if erroneous, could only be corrected by the Court at General Term, on appeal from the judgment. The ground on which the judgment states costs were awarded to J. T. Mills is, that he served an offer before answer, under section 385 of the Code, which was not accepted, and the judgment recovered is no more favorable than that offered. This ground has no existence in fact. The answer set up a counter-claim, which has been extinguished; and in addition to that, the plaintiffs recovered a judgment for the sum offered. This, of itself, is an answer to the claim of J. T. Mills, to recover costs from the time of the offer, as a matter of right. (*Schneider v. Jacobi*, 1 Duer, 694.)

The judgment must be so far modified, as to declare that neither party shall recover costs as against the other, and in all other respects it is affirmed without costs of the appeal to either party.

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WILLIAM T. HOOKER, President of the Continental Bank, Plaintiff and Respondent, *v.* J. F. FRANKLIN, Appellant.

1. A bank which receives from its customer a check, drawn by a third person on another bank, and credits to the customer, in its account with him, the amount of such check, as so much cash, is not guilty of laches, by reason of not presenting it to the drawee until the following day, when, in so presenting the check, it acts in conformity to the regular and established course of business in such cases.
2. Such a depositary bank, by such a transaction, does not undertake to exercise, nor subject itself to the duty of exercising, any greater diligence to obtain payment of the check, than is practised by conforming to the established usage of banks, and the customary course of business in such cases.
3. Hence, in such a case, the depositor of the check, endorsing it at the time of such deposit, will be liable to the depositary for the amount of it, on its being protested for non-payment, when so presented, and being duly notified of such presentation, and of the refusal of the drawee to pay it, although the drawer had funds in the bank, on which it was drawn, during some parts of the day of such deposit, and subsequently thereto, sufficient to pay it.

(Before Bosworth and Woodruff, J. J.)

Heard, December 11, 1857; decided, February 27, 1858.

IN this action William T. Hooker, as President of the Continental Bank, is plaintiff, and Joseph F. Franklin is defendant.

It comes before the Court at General Term, on an appeal by the defendant from a judgment entered on the report of John L. Mason, referee. It was commenced on the 22d of April, 1857.

The action is on a check drawn by the Chicago, St. Paul and Fond du Lac Railroad Company on the American Exchange Bank, dated April 15, 1857, for \$10,000, in favor of J. W. Currier, and by him endorsed to the defendant, Joseph F. Franklin. Franklin endorsed and deposited it in the Continental Bank (of which he was a customer) on the same day. The amount of the check was passed to the credit of Franklin, in his bank account, as cash. The check was not paid by the American Exchange Bank, and Franklin is sued as endorser.

The complaint alleges the above facts, and contains the usual averments of demand of payment, and refusal, and notice, to charge the endorser.

The answer alleges, that the drawers of the check, the Chicago, St. Paul and Fond du Lac Railroad Company, had funds in the

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American Exchange Bank on the 15th day of April, 1857, and at the opening of the bank on the 16th, sufficient for the payment of the check, and that its non-payment was wholly owing to the negligence or improper conduct of the plaintiff; denies presentment and notice; avers that the drawers of the check have paid or secured plaintiff, and that this action is for the benefit of the drawers; avers, that plaintiff notified defendant that it was the rule and custom of the Continental Bank to require all large checks to be certified, before receiving them on deposit, except where the bank intended to assume the payment of the same; also an agreement between defendant, Franklin, and the bank, that the latter was to receive no check for \$10,000, unless certified, and if it did, was to assume the risk of non-payment, &c.

The referee's report, exclusive of its recitals, was as follows, viz. :—

" And I do find, certify and report, that the following facts were established before me:—

" I. The defendant, Joseph F. Franklin, was, on the fifteenth day of April, one thousand eight hundred and fifty-seven, the holder of the check for the sum of ten thousand dollars mentioned in the complaint, dated on the day and year last mentioned, drawn by the Chicago, St. Paul and Fond du Lac Railroad Company, by Charles Butler, their treasurer, upon and directed to the American Exchange Bank in the City of New York.

" II. The said defendant endorsed the said check and deposited the same with the Continental Bank, of which the plaintiff is president, at or about 11 o'clock in the forenoon of the said fifteenth day of April, aforesaid, and received credit for the same in cash in account with the said bank.

" III. The said check was sent by the said Continental Bank to the American Exchange Bank through the Clearing House, according to the established usage of the banks of the City of New York, on the following day, at or shortly after the opening of the bank.

" IV. The said check was returned by the American Exchange Bank to the Continental Bank, about twelve o'clock of the same day, unpaid, payment thereof having been stopped by the draw-

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ers, of which fact the defendant, Franklin, was immediately notified by the said bank.

"V. The said check was also duly presented before three o'clock of the same day to the paying teller of the American Exchange Bank by a notary public, and, payment thereof being refused, the same was protested for non-payment, and notice given at or about three o'clock of the same day to the defendant.

"VI. It was admitted by the parties that there was, on the closing of the bank on the 16th day of April, and still is, a balance in the Continental Bank, to the credit of the defendant, Franklin, of four thousand and forty-four dollars and sixty cents, which was agreed should be credited on the said check if the plaintiff shall recover in this action.

"My conclusion of law upon the above facts is—

"That the plaintiff is entitled to recover, against the said defendant, Joseph F. Franklin, the balance of the said ten thousand dollars, for which the said check was given, after deducting therefrom the sum of four thousand and forty-four dollars and sixty cents, with interest from the sixteenth day of April, one thousand eight hundred and fifty-seven, to the date of this report. Wherefore, I respectfully certify and report, that the plaintiff should recover against the said defendant, Franklin, the principal sum of five thousand nine hundred and fifty-five dollars and forty cents, and also one hundred and thirteen dollars and forty-six cents for interest thereon, amounting in the whole to the sum of six thousand and sixty-eight dollars and eighty-six cents, with costs. All which is respectfully submitted.

"Dated, New York, July 24th, 1857.

"*JNO. L. MASON, Referee.*"

And judgment thereon was entered, on the 31st day of July aforesaid, for the sum of \$6162.77, to which said report the said defendant duly excepted. The exceptions taken are covered by the points made on the appeal.

Gerardus Clark, for appellant.

I. The presentation of the check at the Clearing House by the Continental Bank, and there having it passed to their credit, was

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a payment, at least so far as the defendant was concerned; and if not so, then the subsequent presentation to, and acceptance thereof by, the American Exchange Bank, was clearly a payment; and the endorser (Franklin) was thereby absolved from all further liability on the check.

II. The American Exchange Bank, having funds of the drawers in their hands, had no right, after having received the check and credited it to the Continental Bank, to change that credit at the request of the drawers, and then call upon the Continental Bank for repayment; and still less had the Continental Bank the right to repay the amount, to the detriment of the defendant. Such a course is calculated to throw monetary operations into great confusion and uncertainty.

III. It is evident, from the testimony of De Baun, that if the check had been presented at the American Exchange Bank any time during banking hours on the 15th of April, it would have been paid or certified; and the Continental Bank, by omitting to make such presentation, and presenting it at the Clearing House on the 16th, and there receiving credit for the full amount, assumed the responsibility of its payment, and showed that they intended to rely upon the drawer, according to the evidence of the teller, Henderson and Tallman.

IV. This idea, that the Continental Bank intended to assume the risk, is confirmed by what seems to have been the understanding between the bank and Franklin, as shown by him.

V. The drawers having funds sufficient to pay the check, in the hands of the drawees, the moment the latter received the check, it operated as an appropriation of so much of those funds, and, therefore, as a payment in respect to all other parties. (*Conroy v. Warren*, 3 Johnson's Ca. 264; *Cruger v. Armstrong*, id. 5-8.)

VI. The plaintiffs were chargeable with gross negligence, in not presenting the check to be certified or paid, on the 15th of April, at the American Exchange Bank, where there were ample funds for the payment thereof. And the defendant is thereby exonerated.

VII. For the reasons above stated, the report of the referee was erroneous, and should be set aside, together with the judgment entered thereon.

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Wm. Allen Butler, for respondent.

I. The proof, as to the presentment of the check, demand of payment and notice to the defendant, Franklin, as endorser, was sufficient.

II. There was no want of diligence, nor any improper conduct, on the part of the plaintiff, the Continental Bank, in regard to the presentment of the check, or in any other respect. (*MERCHANTS' BANK v. SPICER*, 6 Wend. 443; *GOUGH v. STAATS*, 13 Wend. 549.)

III. There was no proof that the check would have been paid, if presented on the 15th, or that the drawers had funds in bank when it was presented. The American Exchange Bank refused to pay it, and the check did not, of itself, operate as a transfer or assignment of any of the drawers' funds in their hands, or create any lien thereon. (*CHAPMAN v. WHITE*, 2 Seld. 412; *BALLARD v. RANDALL*, 1 Gray, 605; *DYKERS v. LEATHER BANK*, 11 Paige, 613.)

IV. There was nothing in the transactions at the Clearing House which operated to discharge the defendant, Franklin. The defendant's proof showed, that the credits given at the Clearing House are for all checks, independent of the question whether they will be paid by the banks on which they are drawn, and that this check was dealt with according to the usage and custom of banks, in regard to checks of which the payment has been stopped by the drawers.

V. The taking of security, by plaintiff, for the ultimate payment of the debt, did not discharge the endorser, no time having been given to the drawers, nor their liability in any manner released. (*Story on Bills*, § 427; *Mohawk Bank v. Van Horne*, 7 Wend. 117.)

VI. The defence of a rule or agreement as to uncertified checks, received on deposit, being at the risk of the Continental Bank, wholly failed for want of proof.

VII. The several rulings of the referee, in respect to evidence, and his conclusions of fact and law, are correct, and the judgment should be affirmed with costs.

BY THE COURT. BOSWORTH, J.—The defendant kept an account with the Continental Bank, and on depositing with that bank, on the 15th of April, 1857, the check in question, received

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credit for its amount. Instead of taking it to the American Exchange Bank, and obtaining payment of it, he deposited it with the Continental Bank.

The Continental Bank, in its proceedings to obtain payment of the check, conformed to the established usage of the banks in the City of New York, and the customary course of business in such cases.

The Continental Bank did not undertake, expressly or by implication, to exercise, or subject itself to the duty of exercising, any greater diligence to obtain payment of the check.

It passed through the Clearing House to, and was presented at, the American Exchange Bank, on which it was drawn, soon after that bank opened, on the 16th. That bank refused to pay it, and returned it to the Continental Bank, about 12 o'clock of that day. The defendant was immediately and personally notified of these facts: the defendant said there must be some mistake in the matter, and he would see to it immediately. He told Mr. Tallman, another teller, who went to him with the check, and with information that payment of it had been stopped, "something about some third person, and that he would make it good before three o'clock, P. M."

When a case presents no peculiar circumstances, *laches* cannot be imputed to the holder of a check, as between him and his immediate endorser, merely because he does not present it until the day after he received it. (*Merchants' Bank v. Spicer*, 6 Wend. 443; *Gough v. Staats*, 13 id. 549.)

Certainly no *laches* can be imputed to a depositary, receiving it for presentment and collection, who, in presenting it on the next day after its receipt, acts in conformity with the regular and established course of business in such cases.

A rule which required all banks in the City of New York to present, for payment, all the checks deposited by their customers, on the day of their deposit, would compel them to decline business of that character, and defeat the objects, in many cases, for which deposits are made, and put an end to certain facilities, which result from obtaining credit for the amount of a check, for the day of its deposit, without providing for its payment until the following morning.

The transaction at the Clearing House did not operate as a pay-

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ment of the check by the American Exchange Bank, nor make it the duty of that bank to credit the amount of it to the Continental Bank. Giving to the transaction that effect, would be in direct conflict with the established course of business.

The American Exchange Bank never accepted the check, in any such sense, as to have agreed, even by implication, to pay it, or credit its amount to the Continental Bank.

There was no evidence which authorized the referee to find that the Continental Bank received the check, as a purchaser and at its own risk, or upon an agreement not to look to the defendant, in the event of its being dishonored.

In our opinion, there is no error in the judgment appealed from, and it must be affirmed, with costs.

FREEMAN HISCOX and others, v. JOHN H. HARBECK, WILLIAM H. HARBECK and others.

1. To entitle a party to a lien upon a vessel, under 2 R. S. 493, § 1, sub. 1, (as that statute read prior to the amendment of it made in 1855,) for the price or value of "materials or articles furnished in this State" by him "for, or towards the building" of such ship or vessel, on the application of the person building such ship or vessel, he must prove that the materials, claimed to have been furnished, were actually incorporated into such vessel; that they were used in it, as well as ordered for it.
2. The facts, that materials are ordered for a vessel which the purchaser is then building, and are furnished upon, and pursuant to, such order, and are sent to the yard where that and other vessels are being built, is not *prima facie* evidence of the use of them for the purpose for which they were ordered, although there be no evidence impairing or affecting the proper force and effect of such facts.
3. The contrary of this proposition having been charged, and the charge having been excepted to, a new trial was ordered.
4. An agreement, entered into before the building of a vessel is commenced, between the defendants and such builder, that the vessel should "become the property of the former as fast as the payments were made on her;" and the further facts, that before the materials were furnished by the plaintiffs, the builder was overpaid, by the defendants, for all work and materials; and that the builder having failed before completing her, the defendants, "having overpaid him more than the work and materials were worth," took possession of her and completed her, make the defendants, at all times, owners of the vessel, as the

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building of her progressed, and consequently present a case, in which the person ordering the materials of the plaintiffs was not, at the time, the "owner, agent, or consignee" of such vessel, within the meaning of the statute, and, therefore, the plaintiffs would acquire no lien on the vessel, for the price of such materials. (HOFFMAN, J.)

Heard January 4, 1858; decided February 27, 1858.
(Before DURE, Ch. J., and HOFFMAN and PIERREPOINT, J. J.)

A VERDICT was taken for the plaintiffs in this action, and an order was made at the trial, that the entry of judgment be suspended, and that the questions of law, presented by the defendants' exceptions, should be heard at the General Term in the first instance, and judgment be there applied for.

This is an action on a bond given by the defendants to procure the discharge of a vessel from an attachment, issued under the provisions of the Revised Statutes relating to the collection of demands against ships and vessels, and was tried before Mr. Justice Bosworth, and a jury, on the 13th of October, 1857.

The plaintiffs' counsel read in evidence the bond, dated the 24th of February, 1855. The defendants became thereby bound to Freeman Hiscox and James Devoe, their executors, &c., in the penalty of \$1500, and the condition was, "to pay, or cause to be paid, unto the above-named Freeman Hiscox and James Devoe, creditors, prosecuting the application hereafter mentioned, the amounts of all said claims and demands as shall have been exhibited, which shall be established to be subsisting liens upon the vessel called the City of Mobile, pursuant to the provisions of part iii. ch. 8, title 8, of the Revised Statutes of the State of New York, entitled "Proceedings for the collection of demands against ships and vessels," at the time of exhibiting the same respectively.

It was proved that the plaintiffs were partners in the lumber trade; that W. Perine was a ship-builder, and was building a vessel at Green Point, and that the materials were delivered at the yard of Perine, and were to be used in ship-building; that he had five or six other vessels building at the same yard about the same time; that the lumber was sold to him, and he alone was known as the purchaser. The vessel, in which it was alleged the timber was used, was afterwards called the City of Mobile. The articles were supplied through June and July, 1854.

A witness stated that Perine said, when he bought the lumber,

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it was for that vessel. This was when the first lot was delivered. This evidence was objected to, admitted, and an exception taken.

After the plaintiffs' counsel had rested, a motion was made to dismiss the complaint, which was denied, and an exception was taken to the decision.

The defendants then proved that they were ship-owners; that Perine had built vessels for them before he failed in 1854, and that the vessel in question was known as No. 10, in Perine's yard.

On this testimony being objected to as irrelevant, the defendants' counsel stated, that he offered to prove,

1. That by agreement entered into before the building of this vessel commenced, it was agreed that she should become the property of Harbeck & Co., as fast as the payments were made on her.

2. That before the timber in question was purchased by Perine, Harbeck & Co. had overpaid Perine for all work and materials, and that they were, under the agreement, the owners of the vessel, and that she was insured in their names, and built under a superintendent appointed by them.

3. That they took possession, having overpaid him more than the materials and work were worth, and finished her themselves, and that their payments were always in advance of the work and materials furnished.

But the plaintiffs' counsel objecting to the competency of said evidence, the same was excluded, and defendants' counsel excepted.

The parties having respectively rested, the defendants' counsel renewed his motion to dismiss the complaint, on the ground that it did not affirmatively appear that this timber was used in the City of Mobile, which motion was denied, and the decision excepted to.

And the cause having been summed up, his honor, the presiding Justice, after explaining the provisions of the statutes under which the bond was given, charged the jury, in substance, as follows:—

That, to entitle the plaintiffs to recover, it must satisfactorily appear, that the materials claimed to have been furnished, were actually incorporated into this vessel, and that they were used in it, as well ordered, by the builder, for it. But that when it was proved that materials were ordered for a vessel which the pur-

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chaser was then building, and that they were furnished upon and pursuant to such order, and were sent to the yard where the vessel was being built, such proof, (if no other evidence were given to impair the effect of it) was sufficient *prima facie* evidence of the use of them for the purpose for which they were ordered, to entitle a plaintiff to recover.

To that part of the charge commencing at the words "but that," the defendants' counsel excepted.

He declined to charge the jury, as requested by defendants' counsel, that to entitle the plaintiffs to recover, he must show, by affirmative proof, what portion went in the vessel, otherwise than is hereinbefore stated he did charge; and defendants' counsel excepted to such refusal.

The jury found a verdict for the plaintiffs, in the sum of \$715.76.

James W. Gerard, for the appellants, (defendants.)

C. Nagle, for respondents, (plaintiffs.)

BY THE COURT. HOFFMAN, J.—The statute under which the present claim is to be sustained, if at all tenable, provides: "That whenever a debt, amounting to fifty dollars, or upwards, shall be contracted by the master, owner, agent, or consignee of any ship or vessel within this state, for or on account of any work done, or materials or articles furnished in this state for or towards the building, repairing, etc., such ship or vessel, such debt shall be a lien upon the said ship or vessel, and shall be preferred to all other liens thereon, except mariner's wages." (2 R. S. 493, § 1.)

Two points are, then, to be established: *first*, the work must be done, or materials supplied, for or towards the building or repairing the vessel; *second*, the debt incurred for such work or materials must be contracted by the owner, master, agent, or consignee of the vessel. Each of these circumstances must be found in the case before the lien can attach.

Such was the statute in force when the materials were furnished for which the lien is now asserted. It was not until March, 1855,

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that the Act was amended, by adding the word "builder" to the specification of those by whom the debt must be incurred.

I. The rule of law laid down in the first clause of the charge of the learned Judge, is as follows:—"That to entitle the plaintiff to recover, it must appear satisfactorily, that the materials claimed to be furnished were actually incorporated into the vessel; that they were used in it, as well as ordered by the builder for it."

This language gives, in clear and decided terms, an exposition of the phrase of the statute, "furnished for, or towards, the building, etc., of the vessel." We apprehend, that it declares the true rule of law upon the subject, and is fully sustained by the cases. It is of importance to examine the cases to some extent, as well to sustain the law so declared, as to test the subsequent clause of the charge.

In *Phillips v. Wright* (5 Sandf. 342) it was found that the timber was furnished for a particular ship, and the material men charged the price to Bishop & Simonson, who ordered it; but this did not interfere with his right to look to the ship. It was also found, that some of the timber was not used in the vessel. The plaintiff insisted, that the want of application of the timber to the building of the vessel, for which it was bought, was immaterial; that the statute conferred the lien, where the timber was sold and delivered for building the vessel, without regard to its actual application for that purpose.

But the Court treated this position as unsound. The whole theory of a lien for labor and materials, rests upon the basis, that such labor and materials have entered into, and contributed towards the production or equipment of the thing upon which the lien is impressed. This imposes upon the material man the necessity of seeing that the materials are applied to the purpose for which they are procured, if he design to sell upon a lien given to him. No undue hardship is imposed upon the material man by this. The Act gives him a privilege over all general creditors, on the footing, that the articles have contributed to the making of the ship. It is certainly not asking too much, that he should look to the application of what he furnishes, if he intends to create the statutory lien.

In the case of *The Kiersage* (2 Curtis, C. C. Rep. 421, Maine)

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the facts were these:—The builders were constructing another vessel of the same tonnage and model, at the same yard, at the time when the one in question was being built. The libellants furnished materials for the two vessels, without distinguishing between them. The Court reversed a judgment below sustaining the lien, and sent the case to an assessor to ascertain what materials, purchased for the two vessels, were used in the construction of the Kiersage; for the price of such portion she was liable.

The Judge says, "If materials are furnished for two vessels, although the contract does not specifically appropriate them, they may be considered as furnished to that vessel, in the construction of which they are used. When the builder has actually appropriated them, or some part of them to one vessel, it may be said that they were furnished for that vessel, and so be within the law."

The statute of Maine is, in this particular, substantially like our own.

In *Veltman v. Thompson*, (3 Comstock, 440,) it was said, that the statute clearly implied, that the contract to work or furnish materials must be followed by an actual performance, before the lien could attach.

The case of *The Pacific*, (1 Blatch. C. C. Rep. 537,) shows also, that, to support the lien, the materials must be actually used in the vessel.

In the case of *Ingersoll v. The Bark Cabarga*, (before Justice Nelson, MSS.,) the learned Judge says, "I think it will be found, on looking into the origin and foundation of the rule in the Maritime Code, that the reason and policy upon which it rests, are applicable only to cases where the materials and supplies have been actually furnished to the ship; in other words, where the material-man has parted with the materials, and the ship has received the benefit of them. In the case of materials and repairs, the articles furnished enter into, and give value to, the ship itself."

The learned Judge refers to the case of *The Neptune*, before Sir John Nichol, (3 Hagg. Rep. 139,) as showing the origin and principle of the rule which gives material-men a privilege over other creditors.

The object of the local statutes of various States is, to confer

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upon parties building or repairing domestic vessels, within the State, the privileges which the maritime law has given to foreign vessels under the codes of most commercial nations. This principle was applied to all vessels by the law of Rome, and has become incorporated into the commercial code of perhaps all the continental States, (Digest, 425, 26; Abbott on Shipping, 142; *The Neptune*, 3 Hagg. 124; *Smith v. The Steamer Eastern Railroad*, 1 Curtis, C. C. Rep. 253.)

In England this rule was rejected as to domestic vessels. But in Admiralty, and as to foreign vessels, the doctrine of the civil law prevailed at one time fully, and was overthrown by the courts of common law in the reign of Charles the II., (Abbott 150 n; *The Neptune*, 3 Hagg. 129; Reversed, 2 Knapp's, Pr. Coun. Cases, 94.)

The Statutes 3d, 4th, Victoria, ch. 657, gives the lien as to foreign vessels. In our own country the maritime law has prevailed, (4 Wheaton, 438; 1 Turner, 74.)

It follows that local statutes may well receive their interpretation from the decisions under the maritime rule which they adopt, wherever their provisions are not peremptory and explicit. All those decisions proceed upon the ground that the materials have gone into the ship, and contributed to her existence, her perfection, or her value.

We conclude that the rule laid down by the learned Judge, in the first clause of his charge, is unquestionable law, and adopt the terms in which it is expressed.

II. But the next clause of the charge, and which is excepted to, is as follows:—"When it was proved that materials were ordered for a vessel which was then building, and that they were furnished upon, and pursuant to such order, and were sent to the yard where the vessel was being built, such proof, (if no other evidence was given to impair it,) was sufficient *prima facie* evidence of the use of them for the purpose for which they were ordered to entitle a plaintiff to recover."

We understand the charge to include the element, that the order is made by one possessing the statutory character of owner, agent, or otherwise. The question is, whether the charge is erroneous thus understood?

The proposition contained in it may consist with the fact of

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not a particle of the materials purchased being actually used in the vessel. If the plaintiff proved the matters supposed by the Judge, and rested, he would be entitled to recover.

We consider that there was error in this position of the charge, and error calculated to give a wrong direction to the judgment of the jury. It is not enough, in order to establish a lien upon a vessel, that an owner should order them, and that they be traced to the yard where the vessel is being built in common with other vessels. We are far from saying, that no testimony will suffice but such as pursues and marks each stick of timber from the lumber-yard of the seller to its embodiment in the vessel. Evidence short of this may amount to reasonable and satisfactory proof to a jury of the identity, between what is furnished, and what is employed. It would be improper and fruitless to attempt to define the character or amount of evidence which would be sufficient. The guide to the jury appears to us to be, the general proposition laid down by the Judge in the first instance, with noticing any circumstances in each particular case, which may lead to its just and proper application.

III. Another exception raises the question, whether the contract was made, or debt incurred, by the owner, or agent of the vessel? In connection with this, the offer of the defendants to prove what was the relation between them and Perine, is to be considered.

The Act of 1830, as before stated, contained only the words, owner, master, agent, or consignee. By a statute which was passed, and went into effect on the 29th of March, 1855, the word, builder, was added to the enumeration. All the timber was furnished in the present case, by the end of July, 1854.

In *Hubbell v. Denison*, (20 Wendell, 181,) the plaintiff had been employed by one, who, it appeared, had no other interest in the vessel than as builder. It was held, that he was not an agent, for he had no power to bind the owners, but only himself personally. He was but a contractor, and, as such, was neither within the words, nor the reason or equity of the Act.

So, in the case of *Udall v. The Steamship Ohio*, (MSS. Sept. 30, 1853,) Justice Nelson observes:—"A contractor employed generally to build a vessel—furnishing the materials—to complete her at a given time, and at a specific price, is, doubtless, the owner

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until the vessel is built, completed, and delivered; and under such a contract, the lien of the material-man would clearly attach. But, in this case, the contract is for the construction of the ship after a specified model and materials, to be built under the direction of one of her owners, and to be paid for from time to time, as the work progressed, and the materials were furnished. I cannot doubt that the defendants (for whom the vessel was built) became the owners of it as the work advanced, and was paid for. It seems to me clear, that the framers of the Act did not intend that persons dealing with a mere contractor, divested of ownership, should have a lien on the vessel. The debt is to be incurred by the owner or agent, master or consignee—not by a mere contractor to build."

The subject is well discussed, and the nature of the agency, meant by the statute, much considered in the case of *Childs v. The Steamboat Brunette*, (4 Bennett's Missouri Rep. 518.) It was there held, that a carpenter who had contracted to repair a boat, for a specific sum, was not an agent, so as to bind the boat by a lien, in favor of a lumber-merchant from whom he purchased the timber. The statute of Missouri is similar to our own.

And in *Smith v. The Eastern Railroad Company*, (1 Curtis C. C. Rep. 258,) where the statute of Massachusetts was carefully considered, it was decided, that a seller of materials to one who had contracted to build for a stipulated sum, with knowledge of the contract, could not assert a lien. See, also, *Ladd v. Hughes*, (15 Illinois Rep. 41.)

In *Phillips v. Wright*, before referred to, the Court say, that the evidence, that Bishop & Simonson built the vessel, established, presumptively, the fact, that they were the owners. The contract had not been produced, and there was nothing incompatible with the idea, that they were to continue the owners of the hull, until their work was completed, and the price fully paid.

But the case of *Andrews v. Durant*, in the Court of Appeals, (1 Kernan, 35,) is of principal importance, upon the present question.

The two leading points decided, were:—

1. That in general, a contract for the building of a vessel, or other thing not yet *in esse*, does not vest any property in the party for whom it is constructed, until the thing is finished and

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delivered, or, at least, ready for delivery, and approved by such party.

2. That this rule is not varied by the fact, that payment is to be made by instalments, during the progress of the work, and is so made.

3. Nor is it enough, that the contract can only be fulfilled by completing and delivering the identical vessel commenced—not another similar, and corresponding with the agreement.

4. Nor, again, that there is a superintendent employed to regulate the work.

But it was admitted, that it was competent for the parties to agree when, and upon what conditions, the property in the subject should vest in the prospective owner. Such an agreement would be legal. And the inquiry in the case became this: Whether the parties had so contracted as to transfer the ownership as fast as the different parts of the vessel were added to the fabric. It was decided, that, that particular contract did not so operate.

Now, the offer of the defendants was, *first*, to prove that, by the agreement entered into before the building commenced, it was agreed, that the vessel should become the property of Harbeck & Co., as fast as the payments were made on her, and that said Harbeck & Co. were always in advance; *next*, that before the timber in question was purchased by Perine, Harbeck & Co., they had overpaid Perine for all work and materials, and were, under the agreement, the owners of the vessel.

This appears to us to meet the principle conceded in *Andrews v. Durant*. If such an agreement was proven as proffered, the ostensible ownership of Perine would have been disproved, and that of Harbeck & Co. established.

The offer is very broad—so broad as to cover any case in which an express agreement would be sufficient to create an exception to the general rule, and displace the apparent, and make out the actual ownership.

Questions of difficulty may certainly arise, such as, whether the ownership vests until payment of a specific instalment is actually made, and whether a subsequent failure to pay would defeat the ownership in the part previously vested, under an agreement providing for a progressive ownership. We do not

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enter upon such questions. It is sufficient to say, that under the offer a case can be made which will defeat the lien.

We think a new trial must be ordered, with costs to abide the event.

MARY ANN GRAHAM, Plaintiff and Respondent, v. OWEN DUNIGAN, Defendant and Appellant.

1. Where certain apartments in a dwelling-house, in the City of New York, are assigned to a widow on an assignment of dower in her husband's real estate, and the residue are in possession of the heir-at-law, or his grantee, the taxes and assessments are the subject of equitable apportionment between her and such heir, or his grantee.
2. But no such apportionment can be made, by the assessors or collectors of taxes, etc., or other public authorities of the city, so that either can pay a portion thereof, and discharge his or her part of the premises from the charge or encumbrance.
3. If, in order to relieve her own share of the premises from the charge, prevent the accumulation of a percentage imposed as a penalty for the non-payment, and save the premises from sale for taxes or assessments, the widow pays the whole amount, she may recover from the heir-at-law, or his grantee, his just share or proportion of the amount paid, with interest from the time of such payment.
4. Such share or proportion of the taxes is to be ascertained by taking into view the relative annual value of those parts of the premises held by each respectively; and, in dividing the assessment, the nature of the improvement for which the assessment is made should be considered, having regard also to the benefit resulting therefrom, and its probable permanency, and also the age of the tenant in dower, and the probable duration of her estate.
5. The annual water rate, for the use of the Croton water, is subject to the same division. But a charge for Croton water, separately and specifically made for a particular use, which use is exclusively confined to the apartment of one of the parties, should be borne in whole by such party.
6. In an action brought by the widow to recover from the heir-at-law, etc., his just share of taxes and assessments paid by her, it is not competent to read in evidence an affidavit of one of the commissioners, by whom the admeasurement of her dower was made, to show that the commissioners took into consideration the taxes which would probably be imposed upon the particular dwelling-house in question, and assigned her dower in that house on the assumption that she would pay the whole of the taxes; nor to prove by that or by other evidence, that upon any other assumption there was assigned to her for her dower an under-proportion of her husband's real estate.

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- Such an affidavit, although found on file annexed to the record of the proceedings for the admeasurement of dower, forms no proper part of the record.
7. If the commissioners made the admeasurement upon any erroneous principle or assumption, the heir-at-law, etc., should set it aside by the proper direct impeachment thereof in the proceeding itself.
8. Where it is stated in the case that a witness named was sworn and examined "under objection and exception by the defendant's counsel," the Court on appeal will only consider whether the witness was, upon the facts appearing in the case, a competent witness for the plaintiff. Such an objection and exception does not bring under examination the particular testimony given by the witness, not further objected to, nor any part of it, if any of such testimony was admissible.

Before Bosworth and Woodruff, J. J.

(Heard, Dec. 1857; decided, Feb. 27th, 1858.)

THIS action comes before the Court by appeal from a judgment for the plaintiff, ordered on the trial of the action at Special Term, before Mr. Justice Hoffman, without a jury.

The action is brought by the plaintiff, the widow of one Graham, who died seized of two lots of land, and the dwelling-houses thereon, in the City of New York, who, after the death of her husband, took the usual proceedings to obtain an assignment of her dower, and to whom dower was assigned in one of the houses by appropriating to her several of the apartments and the privilege of the yard, etc. After such assignment of her dower, and while in possession, the defendant (who was the grantee of the heirs-at-law) was in the possession and enjoyment of the remaining apartments.

The annual taxes, and some assessments for public improvements, and also the annual Croton water rate, from time to time became payable and the plaintiff paid the whole amount, and brought this action to recover from the defendant his just share thereof.

The complaint was demurred to, but the same was held sufficient at Special Term, and on appeal to the General Term, the decision was affirmed on the 7th of November, 1857.

It is not material to state the pleadings, since no question arose, on this appeal, which does not sufficiently appear in the opinion of the Court; and the questions arising on the trial are there stated.

The following were the facts found on the trial at Special Term, and the conclusions of Mr. Justice Hoffman thereon:—

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"This cause having been tried before me, without a jury, I find the following facts:—

"That the rental of the whole premises, upon which an apportionment is to be made, is the sum of \$600 per annum. That the proportion which the property not occupied by the plaintiff should bear to this valued rental, is the sum of \$84; that the taxes proven to have been paid amount to the sum of \$269.98, and the defendant's proportion, on the basis of the rent, is the sum of \$37.

"That the plaintiff has paid the sum of \$35 for an assessment for a permanent improvement, of which the defendant's proportion is \$5.

"The plaintiff's life-estate should be charged with \$11 of the remaining \$30, and the estate in remainder with the balance of \$19.

"The sum of \$9 was likewise paid for a permanent improvement, of which the plaintiff should pay \$2.50, and the defendant the balance of \$6.50. That the authorities of the City and County of New York do not apportion taxes or assessments in cases like the present; and that the plaintiff, under the advice of counsel, (as to the saving her dower,) made the payment in full.

"The total amount, chargeable to the defendant, is the sum of \$67.50, which, together with \$7.50 interest thereon, make in all, \$75.25. The decision of the General Term in this case, upon the demurrer, entitles the plaintiff, as matter of law, to recover, upon proving his case.

"I therefore decide, that judgment should be rendered for that amount, in favor of the plaintiff, with costs."

Judgment having been entered in conformity with this decision, the defendant appealed to the General Term.

H. Brewster, for appellant (defendant).

I. The exception to Mrs. Park's testimony was well taken. What rent she pays now was wholly irrelevant, as the action applied to 1852-1856.

II. The testimony does not sustain the finding of facts by the Judge.

III. The taxes and assessments were on the land, not on the upper rooms, and cannot be apportioned. The plaintiff ought,

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therefore, to have paid for herself, and has no claim over against the defendant. (2 R. S. 4th edition, 731, § 18.)

IV. The payment was voluntary, and confers on the plaintiff no right to recover. (10 J. R. 361; 2 Denio, 27; 3 J. R. 434; 10 J. R. 404.)

V. The statutes provide for the proper mode of apportioning taxes in all cases, when they can be apportioned, and the party should resort to the remedies there provided. And this action will not lie, nor has this Court jurisdiction of the action. (1 R. S. 4th ed. 776, §§ 82–89, p. 779; Laws 1821, p. 143, ch. 149; Laws 1843, p. 325, § 11.)

VI. The amount allowed is more than the plaintiff is entitled to. None of the Croton-water tax should be charged to these upper rooms, and certainly nothing for the bar on the premises, that being in the portion occupied by the plaintiff. (See Ordinance of 1851, approved March 20; *Bleecker v. Ballou*, 3 Wend. 263.)

VII. It was wrong to allow the plaintiff to pay, without defendant's knowledge or consent; and then, without showing the account, making a bill or asking the defendant to pay, to charge him interest and costs; and the various exceptions on those points are well taken.

VIII. The exception to the ruling of the Judge, that the defendant should not read the part of the judgment-roll of the proceedings for the admeasurement of dower, offered in evidence, is well taken.

Warren G. Brown, for the respondent (plaintiff).

I. The decision of the General Term of this Court, upon the demurrer in this case, having decided, as a matter of law, that the plaintiff is entitled to recover, upon proving his case, that point is *res adjudicata* here, and will not be again inquired into.

II. The equitable apportionment of taxes and assessments between tenants is, in some measure, a matter of equitable discretion, depending upon all the circumstances, and to be exercised by the Judge who makes the apportionment, and will not be interfered with, unless clearly excessive in amount.

III. No objection was made at the trial, that defendant should not pay his proportion of the entire charge for Croton; nor does

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it appear in whose part of the premises the bar is situated. The charge for the bar is only \$15, of which defendant's proportion would be but \$2. *Lex non curat de minimis.* But the entire water-tax cannot be so divided.

IV. The interest upon defendant's proportion of the taxes and assessments to 20th of June, 1857, was \$13.41, instead of \$7.50, the amount allowed to plaintiff, making a difference of \$5.91, which will more than offset the Croton charge for the bar, or any other excess claimed, if any really exists.

BY THE COURT. WOODRUFF, J.—The plaintiff, as tenant in dower of certain portions of the house at the corner of the Eighth Avenue and Thirty-fifth street, assigned to her by commissioners, in a proceeding brought to obtain an admeasurement and assignment of her dower, sues the defendant, the owner of the fee of the premises, and in possession of the portion not assigned to her, to recover an equitable share or portion of the taxes and assessments paid by her for the protection of the whole premises.

The question in controversy was, whether she can recover for moneys so paid; and, if so, what proportion is she entitled to recover from the owner of the fee of the premises, who is also in possession of some of the apartments in the house.

The plaintiff held, as tenant in dower, the larger portion of the apartments in the dwelling, the defendant the residue; the taxes and assessments were laid upon the whole, (i. e., upon the lot of ground, with the dwelling-house thereon); a failure to pay would result in a sale of the entire premises. It was the plain duty of each party, as between themselves, to contribute and pay a just proportion; and we have no hesitation in saying that, if either pay the whole, he or she is entitled to recover back from the other a just proportion thereof. It is not a voluntary payment, but one which the plaintiff is compelled to make to save his own property.

The statutes cited to us, authorizing an apportionment of taxes and assessments in the City of New York, do not provide for an apportionment among owners of different estates in the same land,—as between the owner of the reversion and the tenant in dower. (Laws of 1821, c. 149, p. 148; sess. of 1843, c. 230, p. 825, § 11 of Art. 3.)

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The statute declaring the effect of the admeasurement of dower and the recovery thereof, (2 R. S. 491, § 18,) provides, that the widow shall hold the same during her natural life, subject to the payment of all taxes and charges accruing thereon, subsequent to her taking possession. This makes her liable for the taxes upon the premises assigned to her, but by no means for the taxes upon that portion not assigned to her; and it therefore becomes the subject of equitable apportionment, when a part of a house is assigned to her, and the residue is held by the heirs-at-law, or their assigns.

In a case like the present, the duty of each is the proper subject of equitable apportionment, having regard to the benefit accruing from the assessment, whether more or less permanent, and considering also the age of the tenant in dower, and the probable duration of her estate. And, as to the annual taxes, it seems quite clear, that they should be contributed to by each in the ratio which the annual value of the apartments, etc., held by each bears to the annual value of the whole premises.

The decision at Special Term, was based upon this view of the rights of the parties; and we think the basis of the decision was entirely correct.

Upon the questions of fact, what is the annual value of the whole premises, and what is the value of the respective portions held by the plaintiff and the defendant? the evidence is not very clear, nor free from contradiction; but we can by no means say that the finding of the Court is so clearly against the weight of the evidence, or without evidence, that it should be reversed.

And, in estimating the benefits resulting from the assessments, for permanent improvements, and apportioning them in view of the probable duration of the estate of the plaintiff, it must suffice to say, that there is nothing in the case which indicates to our minds that the apportionment made at the Special Term was not, in all respects, just and equitable, and made in the exercise of that discretion which properly controls a subject of that nature.

The case states, that "Mrs. Sarah Parks, a witness sworn on the part of the plaintiff, under objection and exception by defendant's counsel," testified, etc., (giving her testimony.) The points submitted on the argument by the appellant, urge that this exception is well taken. What is meant by the witness "being sworn,

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under objection and exception," is not very obvious; it would seem that the defendant claimed, that she was an incompetent witness, and that he therefore objected to her being sworn, and excepted to her admission as a witness; but, as there is nothing in the case, and nothing is now suggested indicating that she was incompetent, it is quite possible, that it was intended to represent that the testimony which she gave was objected to on some other ground, and that the Court overruled the objection, and that the defendant excepted to such ruling. We should be reluctant to reverse a judgment upon such a conjectural construction of the meaning of an exception, even if we could find any thing in her evidence that we thought might or ought to have been excluded, if specifically objected to. We cannot sanction that kind of wholesale exception to the whole of the testimony of a witness; and if such exception be taken, and any part of the evidence be legal and proper, the exception ought to fail. It is only just to the adverse party, and to the Court itself, to require the objecting and excepting party to put his finger on the very subject of his objection and exception.

This witness testified, that she occupied, and for ten weeks had occupied, one of the defendant's rooms and the wood-shed, and paid \$3 per month rent. It is now urged, that what this witness paid at the time of, and for ten weeks prior to, the trial, was no evidence of the value of the premises in 1852, and onward. So far from this ground of objection appearing to have been suggested, it appears that most of the testimony given on the trial was of a similar character, and was received without question or objection. But, had the objection been specifically made, it is answered by the suggestion, that a material inquiry was, what is the relative yearly value of the different portions of the premises? and how shall taxes, down to a period as late as 1856, be apportioned? The trial was in 1857. For this purpose, the evidence was, we think, clearly relevant and proper.

The Court properly refused to allow an affidavit, made by the commissioners who admeasured the dower, to be read, to show how they estimated the value of the premises, and that they took into consideration the large amount of taxes on the corner lot:—1st. It was no proper part of the record; 2d. If they made the admeasurement upon any erroneous principle or assumption, it

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could not affect the plaintiff's rights, so long as the admeasurement remained in force; if wrong, the defendants, in that proceeding, should have had it set aside; and, 3d. It did not show, nor tend to show, that the admeasurement was made upon any idea that the plaintiff must pay more than her just share of the taxes, etc., upon the corner lot, however large they might be; and this answers, also, the offer, made by the defendant, to prove orally that the commissioners made the assignment of dower, assigning to her what was an undue proportion, unless apportioned to her on the basis of her paying the taxes and assessments.

No such evidence can be competent, in any view of the subject, in a collateral action: the assignment of dower must here be conclusively presumed to have been just and made upon correct principles.

It is insisted, that the Court erred in allowing interest to the plaintiff. Upon every just view of the subject, the plaintiff, if entitled to recover at all, should recover interest from the time of suit brought; and an exception to the allowance of any interest cannot therefore be sustained. From what precise day the Court below allowed interest, is not apparent, but a computation will show that the amount allowed is very little more,—less than two dollars more,—than the interest from the date of the summons.

We think, however, that the plaintiff might equitably have been allowed a greater amount of interest than was allowed on the taxes and water rate paid.

It was the duty of the defendant to pay his share of the taxes, etc. Had not the taxes been paid by the plaintiff, the rates of increase by law, imposed by way of penalty for suffering taxes to remain in arrear, greatly exceed the legal rate of interest, and that penalty is saved to the defendant; and this is also true of the water rate and assessments, after the lapse of certain periods prescribed by law. The defendant, therefore, would have been a considerable gainer, even had he been charged with interest from the dates of the respective payments, as we think would have been equitable. So that, in this respect, we deem the judgment less than the plaintiff was entitled to.

But we find that, besides the tax for the Croton water for the use of the premises generally, there was a tax for water for the use of the bar in the store, which belonged exclusively to the

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plaintiff, and which tax it in nowise belonged to the defendant to pay or contribute to; and this last named tax, of five dollars a year for three years, is included in the aggregate apportioned between these parties, and by this means the sum of two dollars and seven cents is cast upon the defendant, which he was not liable to pay. We should do no injustice if we allowed this error to remain uncorrected. What we deem erroneous, in respect to interest, more than balances it. Still, as the plaintiff has not appealed, it will be safer as a precedent, if not our clear duty, to allow the defendant the two dollars and seven cents.

This sum must therefore be deducted from the judgment, and the judgment be affirmed for the residue, with costs of the appeal.

Ordered accordingly.

THEODOSIA D. WHEELER, Plaintiff and Appellant, v. JOHN H. MORRIS and others, Defendants and Respondents.

1. A widow is entitled to dower, in an equity of redemption vested in her husband, in lands, conveyed to him during the coverture, subject to a mortgage thereon.
2. Her inchoate right of dower will not be defeated or extinguished by the foreclosure of the mortgage, during the lifetime of her husband, if she is not made a party to the suit, notwithstanding her husband is made a defendant therein.
3. In the State of New York, when a mortgage is given by the purchaser of lands to his grantor, to secure to the latter the payment of the purchase-money, or a portion thereof, it is not necessary that the wife of the purchaser should join in the mortgage. As against such a mortgagee, the wife's right of dower is in subordination to the mortgage, and cannot be set up to impair the mortgage, or the lien thereof. If, therefore, she survives her husband, she cannot claim dower in hostility to the mortgage, nor except on a full recognition of the mortgage lien. But she, nevertheless, is entitled to dower in the equity of redemption, and is entitled to redeem the premises from the mortgage.
4. In this respect, the widow of one who has given a mortgage for purchase-money, in which she did not join, is in the same situation, and has the same rights as the widow who has united with her husband, in giving a mortgage to secure some other debt; and as the widow of one who had mortgaged his lands before his marriage; and the same, also, as the widow of one who purchased land subject to a mortgage, and died.
5. If a purchaser, who has given a mortgage for purchase-money, conveys the premises to another, subject to the mortgage, the same propositions, above stated,

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- apply; the wife of the last grantee has an inchoate right to dower in the equity of redemption, in subordination to the mortgage, and on the death of her husband she becomes entitled to dower, and may redeem the premises by payment of the mortgage debt.
6. A foreclosure of the mortgage in the life time of her husband, by a suit to which he is a defendant, will not defeat, nor cut off her right to redeem, if she is not also a party.
 7. The mortgagor in lawful possession, and those who may have acquired title by such a foreclosure, and a sale therein, and are in possession, may defend such possession at law against the claim of the widow; they have the legal title, and her claim is subordinate thereto, so long as the mortgage debt is unpaid; but she is entitled to redeem, and a suit in equity may be maintained by her, to be allowed to redeem upon such terms as may be equitable.
 8. The Statutes of New York relating to dower, etc., bearing upon these questions examined and considered.

(Before DURE, Ch. J., and WOODRUFF, J.)

Heard October 16th, 1857; decided March 6th, 1858.

THIS is an appeal by the plaintiff, from a judgment for the defendant, ordered by Mr. Justice Hoffman, at Special Term, on demurrer to the complaint, on the ground, that it did not state facts sufficient to constitute a cause of action.

In January, 1835, George Rapelje conveyed certain lots of ground to William A. Burtis, and, to secure to Rapelje the payment of a part of the purchase-money, Burtis and his wife, at the same time, mortgaged to him the premises conveyed.

In May, 1835, the same premises were conveyed, from Burtis and wife, through several *mesne* conveyances, to Russell C. Wheeler, the then husband of the plaintiff.

A suit was afterwards instituted, in the Court of Chancery, by the executrix of Rapelje, (who had died,) for the foreclosure of the mortgage given by Burtis and wife for purchase-money; and by virtue of a decree pronounced in that suit, the premises now in question were sold to pay the sum of one thousand six hundred and fifty-seven dollars and seventy-nine cents, found due on the said mortgage, on the 10th day of January, 1844; and on the 12th day of February, 1844, a conveyance was executed to the purchaser, by the Master in Chancery.

To this suit, Russell C. Wheeler, the husband of the plaintiff, was a party defendant; but his wife, the present plaintiff, was not made a party.

Russell C. Wheeler, her husband, died in August, 1847.

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The bill of complaint herein alleges the foregoing facts, and that the plaintiff intermarried with Wheeler in 1833, and the plaintiff thereupon claims dower in the premises, and a right to redeem the same, by paying the sum due upon the mortgage, with interest, or such other sum as it shall be adjudged that she ought to pay, and for other and further relief, etc.

The defendants have an interest in the premises, as purchasers and mortgagees, under the foreclosure and decree, and the sale and conveyance by the Master.

Upon demurrer to the complaint, on the ground that the facts stated do not constitute a cause of action, judgment was rendered for the defendants.

The plaintiff appealed to the General Term.

Edgar S. Van Winkle, for the plaintiff, appellant.

I. Russell C. Wheeler, the husband, was seized of an estate of inheritance in the lands in question, during his marriage with the plaintiff, consequently she has a right to be endowed of a third part of said lands. (1 Rev. Stat. 740, § 1. See Park on Dower, p. 5, in vol. 11 of Law Library.) There is no doubt, under our laws, that a mortgagor is seized of an estate of inheritance in the lands mortgaged. The mortgage is a mere security for the debt. (*Waters & Ors v. Stewart*, 1 Caines' Cases in Error, 47; *Collins v. Torry*, 7 Johns. Rep. 278; *Coles v. Coles*, 15 Johns. Rep. 319; *Bell v. Mayor of New York*, 10 Paige, 49, 54; 4 Kent's Com. 45.)

II. The wife, then, is entitled to dower in the equity of redemption, even though she may have joined in the mortgage, and is not cut off by the provision of the Revised Statutes. (1 Rev. Stat. 740, § 5.) The object of the statute was to render unnecessary, as against the amount of the mortgage, any release of dower by the wife. If a mortgage were given for other than purchase-money, and the wife did not join in it, a foreclosure in the husband's lifetime, without making the wife a party, would not cut off her dower. (See 1 Rev. Stat. 742, § 16.) Nor, if the wife joined in such a mortgage, but was not made a party to such a foreclosure, would her dower be barred. (See Statutes as above.) Nor would the husband's release bar it, as was erroneously held in the case in 6 Cow. 316. (*Swaine v. Perine*, 5 Johns.

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Ch. R. 482; 4 Kent's Com. 44.) If it would not be barred in either of said cases, why would it be barred by such foreclosure in a case of foreclosure of a mortgage given for purchase-money? Certainly not by reason of the foreclosure "living the husband," but because she was not endowable in the land at all. The wife is not bound by any proceedings to which she is not a party. (*Haines v. Beach*, 3 Johns. Ch. R. 461; *Tabele v. Tabele*, 1 Johns. Ch. 45; *Swaine v. Perine*, 5 Ib. 482.)

III. The foreclosure "living the husband, can make no difference in the wife's rights. (See *Bell v. The Mayor of New York*, 10 Paige, 49, 67; *Denton v. Nanny, et al.*, 8 Barbour, 618.)

IV. The wife's right is—

1. A right to redeem, or
2. A right to dower in the land, and *mesne* profits.

Jonathan Miller, for the defendants, respondents.

I. The mortgage given by William A. Burtis to George Rapelje having been foreclosed, and a deed of the premises in question having been given to the purchaser, on a sale made pursuant to the decree therein, and the defendants deriving title under that deed, must be held to claim said title under the said George Rapelje, the mortgagee.

II. The mortgage being given for the consideration money, and foreclosed during the lifetime of said Burtis and Russell C. Wheeler, the husband of the plaintiff, in a suit in which Burtis and Wheeler were both parties, neither the wife nor widow of Burtis, nor of Wheeler, is entitled to dower in the premises.

The provisions of the Revised Statutes are conclusive, as against any such claim on the part of the widow of the mortgagor; that is, if Burtis had died without making a conveyance, his widow would not have been entitled to dower. The 5th section of the Revised Statutes, entitled "Of Estates in Dower." 2d Revised Statutes, 4th ed., page 150, is in these words: "§ 5. Where a husband shall purchase lands during coverture, and shall at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands, as against the mortgagee or those claiming under him, although she shall not have united in such mort-

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gage; but she shall be entitled to her dower as against all other persons." The 6th section of the same Act is in these words: "§ 6. Where, in such case, the mortgagee, or those claiming under him, shall, after the death of the husband of such widow, cause the land mortgaged to be sold, either under a power of sale contained in the mortgage, or by virtue of the decree of a court of equity, and any surplus shall remain, after payment of the moneys due on such mortgage and the costs and charges of the sale, such widow shall nevertheless be entitled to the interest or income of the one-third part of surplus, for her life, as her dower." Taking these two sections together, it is apparent, that if the mortgage be foreclosed during the life of the husband, the widow would not be entitled to have any provision made out of the surplus for inchoate dower, nor to any dower, if she afterwards became the widow of the mortgagor.

III. The widow of Burtis, if he had not conveyed the premises before the foreclosure and sale, would not, by the common law, have been entitled to dower. (*Stow v. Tiff*, 15 John. R. 458; *Jackson v. De Witt*, 6 Cowen, 316; *Van Dyne v. Thayre*, 19 Wendell, R. 162; *Cunningham v. Knight*, 1 Barbour, S. C. R. 899.)

IV. Burtis's wife, provided he had died without making a conveyance, would not be entitled to dower. The plaintiff claims through Burtis; and as against the defendants, who claim under the mortgagee, she is not entitled to dower. First, the ground upon which the claim of the widow of Burtis would be barred is, that Burtis, as shown by the above authorities, had no seizin of the estate, which subjected it to dower as against the mortgagee or those claiming under him. Second, that he could not convey any greater estate to another, or create any other seizin as against the mortgagee than he owned or held. (*Coates v. Cheever*, 1 Cowen, 460; *Van Dyne v. Thayre*, 14th Wendell, 236; *Sandford v. McLean*, 8 Paige, R. 123.)

BY THE COURT. WOODRUFF, J.—The question presented to our consideration on this appeal is, whether the plaintiff is entitled to redeem the premises, in virtue of an interest therein, as the once wife, and now widow, of Russell C. Wheeler, to whom the premises were conveyed, subject to a mortgage given thereon for

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purchase-money by the party from whom his title was derived. And this question involves an inquiry, what were the rights of the plaintiff prior to the foreclosure of that mortgage? and second, how does that foreclosure affect her?

It is, of course, conceded, that Russell C. Wheeler, her husband, acquired, by the conveyance of the premises to him, an equity of redemption in the mortgaged premises.

And the general doctrine, well settled in this State, that a wife will be endowed of an equity of redemption vested in her husband during the coverture, is not disputed. (*Hitchcock v. Harrington*, 6 J. R. 290; *Collins v. Torrey*, 7 Ib. 278; *Coles v. Coles*, 15 Id. 319; *Lane v. Shears*, 1 Wend. 437, and cases cited.)

But it is claimed, that the mortgage in the present case, being a mortgage given for the purchase-money, neither Burtis nor any grantee under him had such a seizin, that the general doctrine last mentioned is applicable.

This, it is insisted, should be regarded as settled as the law before the Revised Statutes by the cases of *Stow v. Tiff*, 15 J. R. 458, and *Jackson v. De Witt*, 6 Cow. 316, and unqualifiedly affirmed by the provisions of the Revised Statutes on the subject of Dower, (1 Rev. Stat. p. 740, 744, §§ 4, 5, and 6.)

Section 4 of the statute provides, that where a person seized of an estate of inheritance in lands shall have executed a mortgage of such estate before marriage, his widow shall, nevertheless, be entitled to dower out of the lands mortgaged as against every person, except the mortgagee, and those claiming under him.

This was no restriction of the widow's right of dower within limits more narrow than had before bounded that right. The Courts had already settled, that a mortgagee has in this State only a chattel interest in the land as security for his debt, and that the freehold remains in the mortgagor. (*Runyan v. Mersereau*, 11 J. R. 584; *Wilson v. Troup*, 2 Cow. 196, 7 Cow. 13, Id. 71, 6 Ib. 147, and cases above also cited.)

And that such freehold, being an estate of inheritance, the widow has dower therein subject only to the mortgage; and might as against the heirs-at-law have an assignment of dower and maintain her action at law therefor. (5 J. Ch. R. 452.)

But this right of dower was subject to the mortgage and in

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entire subordination to the rights of the mortgagee. (See *Van Dyne v. Thayre*, 14 Wend. 234.)

This fourth section was, therefore, a mere affirmation of the pre-existing law as it had been declared by the Courts. It gave the mortgagee no new rights. As against him, she was placed in the same subordination as any other person acquiring an interest subject to the mortgage. That is to say, his title to have and enforce his lien upon the premises could not be prejudiced nor be defeated by the subsequent marriage of the mortgagor.

We are aware that the present is not a case under the fourth section. We refer to it, however, because the provisions of the fifth section are so nearly identical in the particulars material to this case that they ought both to be kept in view in determining the intent and scope of the statute.

And this reference to the decisions above noted, and to this section of the statute, shows, we think, that whatever doubt may have existed in England, and formerly in this State, whether the execution of a mortgage so divested the title of the husband that he could not be said to have been seized during the coverture of an estate of inheritance so as to give dower to his wife, is put at rest. He is seized, but that seizin is qualified by the outstanding interest of the mortgagee, and as against such mortgagee no act, conveyance, or marriage will operate to impair that interest.

Upon a consideration of the 5th section, which, it is supposed, governs the present case, it will, we think, appear that these views are material, and furnish a guide to the determination of the rights of the parties.

To the correct understanding of the 5th section, it seems material to observe, that a doubt had existed whether, on a conveyance to a husband, he did not become instantly seized of an estate of inheritance; so that his mortgage, given back to secure the purchase-money, was subject to an inchoate right of dower, acquired by the wife *eo instanti* the deed to her husband was delivered.

This question was brought before the Court in *Slow v. Tiff*, (15 J. R. 458,) and it was there urged, that as the conveyance to the husband vested the title in him, before he could in turn reconvey by way of mortgage, the seizin of the husband, though but for an instant, was sufficient to entitle the wife to dower. And Mr.

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Justice Thompson was of that opinion. A majority of the Court held otherwise.

It will be noticed that, in that case, the premises had been sold under a power of sale contained in the mortgage, and the widow was claiming dower, not in the equity of redemption, but in hostility to the mortgage, at law, and against the party who held under the mortgage.

This case, therefore, in no wise settled that the wife took no interest in the equity of redemption. That equity of redemption remained in the husband as truly, for all purposes, as if he had bought the land subject to the mortgage. There is no reason whatever for saying that the wife was not as well entitled to dower in that equity of redemption as in any other, nor can the Court be deemed to so hold. The point was, whether she had acquired a right of dower, as against the mortgagee, prior and superior to his right, and the majority of the Court held that she had not. In regard to her equitable right to redeem, or her right as against the heirs-at-law, or purchasers of the equity of redemption from her husband, the Court had nothing to say. No question was before them on the subject.

So, in the subsequent case of *Jackson v. De Witt*, the point really before the Court was the same. The defendant, in ejectment, was in possession under the title of the mortgagee, and it was held that the widow of the mortgagor could not maintain the action to recover her dower. The ruling must have been the same, had that been a case in which her husband had been a purchaser of the premises subject to the mortgage. All, therefore, which was necessarily involved in, or decided by, these cases, was that the conveyance to the husband, who gave back a mortgage for purchase-money, did not give him such a seizin that the right of dower of the wife attached, intermediate the deed and the mortgage; and, therefore, that she could not maintain an action at law against the mortgagee, or those claiming under him. As against them, she was not entitled at law to dower.

But, in the first case, the decision was made by a divided Court. In the last case, the reasoning of the Judge by whom the opinion of the Court was delivered, is expressed in language which might create what we deem a misapprehension, that the Court thought she could not have dower, even as against the heirs-at-law, or

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purchasers from the husband: though, on a careful examination of the opinion, and the facts to which it was applied, it warrants no such view.

In this state of the adjudications on the subject, the Revised Statutes were enacted, and the revisers, having the case of *Slow v. Tiff* in view, and intending to declare the precise rule of that decision, (see revisers' notes,) proposed, and the Legislature adopted, the 5th section, the effect of which we are now considering.

By this they provide, in relation to premises purchased by the husband during coverture, and mortgaged at the same time to secure the purchase-money, that "his widow shall not be entitled to dower, as against the mortgagee, or those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to her dower as against all other persons."

This removed all doubt, if any before existed, whether the deed to the husband gave him such a seizin as let in the inchoate right of dower, to the prejudice of the mortgagee, and yet affirmed her title to dower in the equity of redemption. It placed her in the same situation, or rather declared her to be in the same situation, in respect to her claim to dower, as though she had united in the mortgage, and in the same situation, in that respect, as her husband himself, or any purchaser from him; in short, the mortgagee had a paramount claim against her and them, and neither she nor they could, as against the mortgagee, set up their title.

This was precisely what had been provided by the 4th section, in reference to the rights of a wife in premises mortgaged by the husband before marriage, as already noticed, and as was expressly decided in *Van Dyne v. Thayre*, (14 Wend. 233,) above cited.

From this time, we apprehend the whole inquiry, whether the seizin of the husband, in an equity of redemption, either by purchase subject to a mortgage, or remaining after a mortgage given by himself before marriage, or resulting from a conveyance to himself during the coverture, where he executed a mortgage for the purchase-money, was such a seizin as entitled the wife to dower, was settled, and the right in each case was the same. As against the mortgagee, and those claiming under him, she had no

legal right. Her interest was wholly subordinate to theirs, and could neither impair nor defeat the mortgage.

But, in each case, the equity of redemption remained. Of this she might yet be endowed. As against all others, her right to dower was unqualified. (*Van Dyne v. Thayre, supra.*)

If the mortgagee was in lawful possession, she could maintain no action against him to recover her dower. If the mortgage was foreclosed, she, as well as every other person interested in the right to redeem, was debarred of her right. In short, the wife had no interest which created any obstacle to the enforcement of the mortgage, or the maintenance of the rights secured thereby, according to the very tenor of the mortgage. In this sense, she had no dower, as against the mortgagee, and could maintain no action for dower against him, founded on a claim to dower.

The 6th section of the Act, raises no implication inconsistent with this view of her rights. It provides, that upon a sale of the premises after the death of her husband, either by virtue of a power of sale in the mortgagee, or of a decree of a Court of Equity, she shall be entitled to the income of one-third of any surplus which may remain after payment of the moneys due on the mortgage. That is to say, such surplus shall not be deemed converted into personal estate, and pass to the representatives of the husband, nor to any then claimant, by purchase from the husband; it shall remain, for all the purposes of securing her interests, real estate still, and she shall have dower therein, as she would in the proceeds of land sold in partition; and as she would in a portion of the mortgaged premises remaining unsold, after moneys sufficient for the payment of the mortgage had been raised.

Our conclusion is, therefore, that a wife has an inchoate right of dower in the equity of redemption of premises conveyed to her husband, and by him, at the same time, mortgaged back to secure the payment of the purchase-money; that she is directly and immediately interested in the payment of the mortgage debt; that, so long as the title of the mortgagee has not been made absolute by a foreclosure, which is effectual to cut off that equity, she is entitled to pay the debt, and take dower in the premises; that, although she cannot set up a claim to dower as against the mortgagee, to impair or defeat the mortgage, she may avail herself of the right which she has, even at law, as against all others, in any

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mode not inconsistent with, but in affirmance of, the mortgagee's interest, and, in equity, may seek a redemption.

This conclusion seems to us fully sustained by the decision in *Bell v. The Mayor, etc.*, (10 Paige, 49;) and we refer to that case, and to *Titus v. Neilson*, (5 John's Ch'y, 452,) to *Denton v. Nanny*, (8 Barbour, S. C. Rep. 618,) and *Mills v. Van Voorhis*, (23 id. 125,) for a review of the cases bearing upon the subject, which will show much more fully than we have done the course of decision in relation to this subject.

It is proper to add, in this connection, that the case now before us is not literally within the terms of either section of the statute which we have been considering. Here, the mortgage was not given by the plaintiff's husband, either before or after marriage. Nor was the mortgage one in which, it being given for purchase-money, the wife of the mortgagor did not unite. Burtis and his wife gave the mortgage. Even though there had been no such statute, the wife of Burtis could not claim her dower in the face of her own mortgage, against the mortgagee.

Wheeler, the husband of the plaintiff, was simply the purchaser of an equity of redemption. Neither he, nor his grantors, had any title, except in subordination to the mortgage. But he had a clear equity of redemption, as we think, with all the incidents belonging to such an equity, whether it is founded upon a title subject to a mortgage for purchase-money, or for any other cause. It is not evident to our minds, that if the mortgage given by Burtis and wife had been a mortgage of premises previously acquired, and given to secure a loan of money, the rights of Wheeler or his wife would have been, in equity, other or greater than they were in the present case. They would have held the premises in subordination to the mortgage, and neither would have any interest, except the right to the possession of the premises, until a foreclosure, and a right to pay off the mortgage, in exoneration of the land.

We have, however, discussed the question as though the terms of the statute embraced this precise case, and have treated the plaintiff as having no other or greater right than Mrs. Burtis would have had if she had not united with her husband in the mortgage.

In the view we have taken of the subject, it is not material

that any distinction should be made. It is quite clear that the position of the plaintiff is not less favorable to her claim to redeem, than the position of Mrs. Burtis would have been.

Our conviction is, that the only substantial difference between a mortgage for purchase-money, and a mortgage for any other debt, as respects the right of dower, is this; the former does not require execution by the wife, to become binding upon her, and superior to her right to dower; the latter does.

And in each case, there remains vested in the husband an equity of redemption, in which the wife, if she survive the husband, may have dower, and, in virtue of which, she is entitled to redeem.

It remains to consider how the foreclosure of the mortgage in the life time of the husband affects the plaintiff, she not being made a party thereto.

Although the Chancellor, in *Bell v. The Mayor*, (*supra*) forebore expressing an opinion on this question, Vice-Chancellor Buggles clearly intimates that her right to redeem would not be affected by a foreclosure, in equity, to which she was not a party, and Mr. Justice Emott, of the Supreme Court, is unqualified in the expression of that opinion, in which Mr. Justice Brown concurred. The reasons given in those cases seem to us to be conclusive on the point. (See cases above cited.)

Upon general principles, it would seem quite clear that no separate interest of the wife could be affected by a suit to which she is not a party. Her husband is, in reference to her inchoate right of dower, in no sense her representative.

The doubt which has been thrown around the question results from a want of attention to the same distinction which prevails in relation to the *right* of the plaintiff. At law, the mortgagee could maintain his possession against an action for dower. When he was in lawful possession, she had no claim, except through a redemption of the premises. Hence it is said, that when the mortgagee is in, by entry or foreclosure, he may defend himself there, and the consent of the husband is sufficient to enable him to obtain possession. Such a possession may be gained through a foreclosure in the life time of the husband, although the wife be not a party. Acquiring all the interest of the husband, is sufficient for that purpose. Further than this, no case has gone which has fallen under our observation.

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But a possession gained, does not of itself defeat the equity of redemption: it may be defended at law, until payment of the debt.

We apprehend, that as to the interests of all persons who are not parties to the suit for foreclosure, (either directly or by representation,) the suit is wholly inoperative. Making the husband a party doubtless has the same effect as if he and the mortgagee had united in the conveyance to the purchaser, under the decree, but it can have no greater effect.

On this subject, our statute seems to us too explicit to be open to any general reasoning upon the subject. (2 R. S. 192.) It directs the execution of deeds to the purchaser, and declares that they "shall vest in the purchaser the same estate (and no other or greater) that would have vested in the mortgagee if the equity of redemption had been foreclosed; and such deeds shall be as valid as if the same were executed by the mortgagor and mortgagee, and shall be an entire bar against each of them, and against all parties to the suit, and their heirs respectively, and all claiming under such heirs."

And by the Act in relation to dower before cited, (1 R. S. 741, 742,) it is expressly provided in § 16, that "no act, deed or conveyance, executed or performed by the husband, and no judgment or decree confessed by or recovered against him, shall prejudice the right of his wife to her dower, or preclude her from the recovery thereof."

We are constrained to say that these provisions of the statutes require us to regard the case as though no foreclosure had taken place, so far as the plaintiff is concerned; and the question then recurs,—

Suppose the mortgagee had obtained lawful possession in the life time of the husband of the plaintiff, and so continued until his death, would she then be entitled to redeem? We cannot hesitate to answer that she would. And if so, a decree recovered against her husband, a sale under such a decree, or even a deed by her husband, does not take away or prevent that right.

The questions, Upon what terms she shall be permitted to redeem? How much she shall be required to pay? How the improvements placed upon the lots, since the foreclosure, shall be taken into view to prevent her acquiring a greater interest than would be equitable as against the purchasers? and, Whether, seek

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ing her relief, as she is compelled to do in a Court of Equity, she is equitably entitled to a greater interest, upon any terms, than dower in the lots, regarded as vacant and unimproved? and other questions, which we see may arise hereafter, are not now before us. Probably the statute regulating the admeasurement of dower, (2 R. S. 490, § 18, sub. 2,) and the decisions already had on this subject, (*Walker v. Schuyler*, 10 Wend. 483, and cases cited,) sufficiently establish the rules by which her dower should be allotted, and thus, incidentally, may limit the right to redeem to some very small share of the premises, as they now exist. Our conclusion is, that upon such equitable terms, and with such qualifications as may, on a more full development of the case seem just and equitable, she is entitled to relief upon the case as exhibited in the complaint: the facts therein stated do constitute a cause of action.

The judgment should, therefore, be reversed, and the demurrer be overruled, with leave to the defendants to answer, upon the usual terms of paying the costs of the demurrer and proceedings thereon at Special Term. The costs of the appeal should abide the event of the suit.

Ordered accordingly.

RICHARD LIDDLE, Plaintiff and Appellant, *v.* ANDREW B. HODGES, Defendant and Respondent.

1. A landlord has such an interest in knowing the character and reputation of his tenants, that words spoken to him by a third person, in answer to inquiries made respecting the character of a tenant, are, in their nature, privileged; and if the words are spoken without malice, such third person is fully protected.
2. The burthen of proving actual malice in the speaking, when the words are spoken on an occasion which creates the privilege, is upon the plaintiff.
3. The language employed by the defendant, may be such as to warrant the inference of malice, without other proof; and if the Court can see that such an inference may reasonably be drawn from the words alone—as where they are such as to indicate passion, ill-will, or a disposition to incite hostility, or are vituperative beyond what the occasion seems to require—the question of malice should be submitted to the jury; although, if not maliciously spoken, the speaking was privileged.

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4. But, on the other hand, if the Court can see that the language used will warrant no such inference, and there be no other proof of malice, it is the duty of the Court to order a nonsuit, or a dismissal of the plaintiff's complaint.
5. The question of malice in a communication, written or spoken on a privileged occasion, stands in this respect, on the trial of an action of slander, etc., like any other question of fact in any other action. It is to be submitted to the jury, if the evidence be such as would sustain a verdict for the plaintiff, and not otherwise.

(Before DUNA, C. J., and WOODRUFF, J.)

Heard, October 22d, 1857; decided, March 6th, 1858.

THIS action comes before the Court on an appeal from a judgment for the defendant, ordered at the trial, dismissing the plaintiff's complaint, and awarding to the defendant his costs.

The action was tried before Mr. Justice Bosworth and a jury, on the 29th day of January, 1857. It was brought to recover damages from the defendant, for alleged slanderous words spoken of the plaintiff, by the defendant.

The answer stated certain facts, which, if proved, would tend to establish the truth of the words spoken, and denied all other allegations in the complaint.

The plaintiff's only witness, who testified to the speaking of the words, also testified to the circumstances under which they were spoken. Both the words spoken and the facts and circumstances so testified to, are fully stated in the opinion of the Court.

The Judge deemed the proof to establish, that the occasion of the speaking was such that the communication was privileged in its nature, and that there was no evidence of malice on the part of the defendant, which ought to be submitted to the jury. There was no evidence of any extrinsic fact tending to show malice; and it was held, that the words themselves did not warrant the inference of malice in the defendant.

The plaintiff claimed the right to go to the jury upon the words themselves, and insisted upon his right to do so, and to ask the jury to infer from them, that the defendant was actuated by malice in the speaking.

But the Judge ordered that the complaint be dismissed; and judgment in favor of the defendant was accordingly entered for his costs of suit. The plaintiff duly excepted to the ruling, and appealed from the judgment to the General Term.

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Although some other exceptions were taken at the trial, it was not suggested, on the argument of the appeal, that any error was committed, except in the ruling above stated, and no other point was raised or discussed on the argument.

I. T. Williams, for the plaintiff (appellant).

The Court erred, in refusing to submit the case to the jury upon the question of malice.

I. The privilege of a communication is predicated, not of the communication itself, but of the circumstances under, or occasion upon which it is made, and not of the subject matter of the communication. A communication may be *prima facie* privileged, although it should contain internal indications of malice. (*Wright v. Woodgate*, 2 Crompt. Mes. & Ros. 573; *Fairman v. Ives*, 5 Barn. & Ald. 642.)

II. Whether a communication, never so privileged, does contain internal evidence of malice, is always a question solely for the jury. (*White v. Nicholls, et al.* 3 How. 266.) The Court, in that case, say, "The jury, and the jury alone, were to determine whether malice did or did not mark the publication—the question of malice is to be submitted to the jury upon the face of the libel or publication itself." (*Ex parte Baily*, 2 Cow. Rep. p. 479; 6 Cow. 76.)

III. The meaning of the words—the sense in which they were understood—has always been regarded solely as a question for the jury.

IV. The Court has no right to take a case away from the jury, on the ground, solely, that the communication is privileged. If the words used would otherwise be actionable, the case must go to the jury upon the face of the publication, to say whether the party did not avail himself of his privileged condition to vent his malice; whether from the face of the publication, aside from the circumstances under which it was uttered or written, they believe the party was actuated by malicious motives. (*White v. Nicholls*, 3 How. 266; *Wright v. Woodgate*, 2 Crompt. Mes. & Ros. 573; *Coward v. Wellington*, 7 Car. & P. 581, 586, above cited.) In *Fairman v. Ives*, (5 Barn. & Ald. 642,) the Court charged the jury, that "if they thought the petition contained only a fair and

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honest statement of facts, according to the understanding of the party who sent it, they ought to find a verdict for the defendant;"—leaving it for the jury to say, upon the face of the publication, whether it was malicious; and in commenting upon the case, the Court say, "unless it be maliciously done, the communication is considered privileged by the occasion on which it was made."

William Cogswell, for the defendant (respondent).

I. The evidence given on the part of the plaintiff at the trial, showed, beyond all question, that the words charged as slanderous were a privileged communication; and the plaintiff, failing to give any proof of malice, was properly nonsuited, (*Bromage v. Prosser*, 4 B. & C. 256; 10 Eng. Com. Law Rep. 822; *Thorn v. Blanchard*, 5 John. Rep. 508; *Vanderzee v. MacGregor*, 12 Wend. 545; *Hargrave v. Le Breton*, 4 Burr, 2422; 4 Coms. 162, 166.)

II. There was no error in the ruling of the Court at the trial, and the judgment upon its decision should be affirmed with costs.

BY THE COURT. WOODRUFF, J.—The grounds which are urged in support of the present appeal are embraced within two principal questions—first, Whether the communication made by the defendant, and alleged to be slanderous, was a privileged communication? and second, If it was in its nature privileged, then whether it should have been left to the jury to say whether it was maliciously made by the defendant?

In relation to the facts proved there is no dispute. The insurance company, of which the defendant was the president, having made an insurance of a building belonging to one Graves, were applied to for an alteration of the policy. The secretary, in reply, not only declined to make the alteration, but, in accordance with a privilege reserved in the policy, notified Graves that he declined insuring the building longer, and that he should cancel the policy on the 3d of January then next. And in reply to a note of Graves, requesting him to state the reason why the company declined to insure longer, the secretary informed him that

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if he would call at the office he would speak more fully in reference to the subject.

Graves accordingly called at the office of the company, saw the defendant (the president) and told him he had called to learn why the company declined to continue insuring his building in Brooklyn, and urged him to state the reasons. In answer, the defendant made the communication of which the plaintiff now complains. He (the defendant) inquired if the plaintiff was not occupying a portion of the building; and being answered in the affirmative, he stated that the company would not insure any building where Liddle was. Being asked why? he said, "The building where Liddle was, which the company had insured, was burnt down under very suspicious circumstances;" adding, "what would you think of a man being seen around the store the morning of the fire, at two or three o'clock in the morning, before the fire? There was an old woman that lived in it, or in an adjoining building, who knew more about it than he did, and if she had not died, the company would not have paid the insurance." The defendant further stated at the time, to the effect, that he did not know the plaintiff, personally, and should not know him if he saw him.

Under these circumstances, we have no hesitation in saying that the communication was in its nature a privileged communication. Not that the communication was absolutely and unqualifiedly privileged, so that it could not be the subject of inquiry; but that the occasion and circumstances of the speaking were such that the defendant is *prima facie* protected in his communication, and there could be no recovery against him without proof that the words were falsely and maliciously spoken.

The communication related to the business of the applicant, Mr. Graves, in a particular wherein he was especially interested. If his tenant bore such a reputation that the company deemed it unsafe to insure premises occupied by him, or if the previous experience of the company had suggested such doubts, in regard to his conduct on a former occasion, as would render it proper to decline the insurance, it was of importance to Graves to know it; and it was the plain duty of the officers of the company when called upon and urged thereto to give their reasons, and why the occupancy by the plaintiff was objectionable. It has often been

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said that it would be impossible for the affairs of mankind to be conducted, if they who were interested directly in the character of those with whom they deal, or in whom they confide, might not seek and obtain such information and opinions as their neighbors possess without being hindered by the apprehension on the part of such neighbors that suits for slander could be sustained against them for acting in good faith and in entire frankness with those who consult them.

Communications respecting the character of a servant, made in response to an inquiry by one who proposes to employ such servant, are familiar illustrations of the principle. So of communications respecting the standing, character, and credit of one who proposes to deal, as customer, with another, made in answer to the inquiries of such other; and so of communications made to a public officer, leading, as the case may be, to the arrest of a supposed offender.

When a duty to the public, or to the party seeking information, requires that one should freely impart what information he has, or express the opinion his observation or experience has enabled him to form, he is to be protected, unless it is shown that he acted in bad faith, and under the influence of malice.

The rule is very distinctly and clearly laid down by Mr. Justice Parke, in *Cockayne v. Hodgkisson*, (5 Carr & Payne, 543), and was there applied to a case in which the plaintiff, being a game-keeper, his employer had requested the defendant (his tenant) to communicate any thing he saw or heard, which was wrong, respecting game on his land.

Whether the facts above recited should have been submitted to the jury, is, however, the question which is most strenuously urged upon our attention by the plaintiff's counsel.

Upon the proofs stated, the Judge, at the trial, ordered a dismissal of the complaint, or non-suit, on the ground that the plaintiff had failed to prove malice on the part of the defendant. And it is now insisted, that that was exclusively for the determination of the jury, and that the Court had no right to take the case from them, under any circumstances; that, if the communication be slanderous, then, though privileged, the plaintiff has always a right to go to the jury, and submit to them to find, upon

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the mere face of the communication, whether it was maliciously spoken.

In this, we are quite clear, that the plaintiff is in error, though we fully assent to the general rules upon which he relies. The question of privilege relates to the occasion of the speaking, not to the matter of the communication. Where the facts which go to create the privilege are in dispute, those facts are to be inquired of by the jury; but when the facts are not controverted, the question of privilege is for the Court.

So, when the communication is, in its nature, privileged, the question whether the communication was made *bona fide* without malice, or was malicious, is a question for the jury; and the communication itself may be of such a character, and bear on its face such evidence of the malice of the defendant, that it may, and ought to be, submitted to the jury.

But the question of malice or no malice, in the defendant, is not otherwise a question for the jury, than questions of fact generally are, in all *nisi prius* trials. The issues of fact are for the jury. Nothing is more common than to say, that questions of fraud are peculiarly questions for the jury; and yet, this does not mean, that it is any more the duty of the Court to submit that question to the jury, unless the evidence be such as would warrant it, than it is to submit any other question of fact to them, without evidence to support it.

So, the sense in which words spoken were used and understood, is to be submitted to the jury; but not when they are clear and unambiguous, and the circumstances under which they are spoken create no doubt of their meaning.

Nor is it claimed, nor do we hold, that the mere fact that the communication is privileged, gives the Court the right to withdraw the case from the jury where, as in the present case, the privilege is not absolute. If there is any evidence of express malice, either on the face of the communication itself, or in the extrinsic proof, which would sustain a verdict for the plaintiff, if the jury should find that the words were spoken maliciously, then, and then only, the plaintiff is entitled to have the question submitted to the jury; and this is the whole extent of the authorities relied upon by the appellant. And upon that view of the subject, non-suits have been frequently granted.

A jury have no more right to find malice in the defendant, without sufficient evidence, than they have to find any other fact in the plaintiff's favor, without proof.

And, if the Court can, and does, see, that a verdict against the defendant, upon that question, would be without evidence, it is the duty of the Court to non-suit. The general rule on this subject, is now well settled, as to issues of fact generally. (1 Wend. 376, and other cases cited in 4 Selden, p. 74; 7 Hill, 529.) And there is no ground whatever, for making the question of malice, in this action, an exception. Indeed, the Court of Appeals have gone so far as to say, that the submission of a question of fact to the jury, when there is no evidence to support it, is error (*Storey v. Brennan*, 15 N. Y. Rep. 524); and it has often been decided, that a non-suit is proper, whenever a verdict for the plaintiff would be set aside, as against evidence, or as without evidence to support it.

In this case, the party to whom the defendant's conversation was addressed, was a dealer with the company of which the defendant was the president. He had an interest in knowing the reason why the company declined insuring his building, and especially in knowing if there was any thing in the character or conduct of the occupants of the building, which either rendered it unsafe, or increased the difficulty of effecting insurance. He applied for the information. Common fairness and frankness, and the confidence which should subsist between dealers, not only justified but required, that the defendant should state what he knew or believed on the subject. There is nothing in what he said that warrants even a suspicion that he did more than this; and so far from importing malice, the whole communication imports that he did no more; since he, at the time, disclaimed any personal acquaintance with the plaintiff, or that he should know him if he saw him.

We have no hesitation in concluding, that, if upon this evidence alone, the jury could have been induced to find that the words were maliciously spoken, it would have been our duty to set the verdict aside, as without any evidence to support it.

In the cases upon which the appellant relies, in which, although the communication was, in its nature, privileged, it was deemed proper to submit the question of malice to the jury, there was

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either proof of extrinsic facts bearing upon that question, or the manner or terms of the communication, with its details, explanations and imputations, were such as reasonably created a doubt, whether the occasion was not used for the indulgence of spite or ill-will, or in order to accomplish some other and sinister purpose.

In *Cockayne v. Hodgkisson*, (5 Car. & P. 543,) the communication itself warranted a suspicion, that the object of the defendant was to supplant the plaintiff, and obtain for the defendant the plaintiff's situation; and *White v. Nichols, et al.* (3 How. U. S. Rep. 266,) is, we apprehend, in that respect, of the same character. There the communications were several. They were volunteered without solicitation. Their object was, apparently, to accomplish the removal of the plaintiff from office, and to secure the office for one of the defendants. The terms and style of the communications were vituperative in no slight degree. The Court, at the trial, had not only refused to permit them to be read, but refused to permit extrinsic proof that they were false, in fact, in particulars in which the statements were made as of the knowledge of the defendants. The actual decision upon the reversal, in that case, in no wise conflicts with the views above expressed. And although there are, in the language of the opinion given in the Court at bar, expressions that seem to countenance the proposition contended for by the present plaintiff, we are satisfied that, taken in connection with all the circumstances of that case, there is no reason to regard that case as in conflict with our views. In *Coward v. Wellington*, (7 Car. & P. 531,) there was in the extrinsic facts proved, some slight reason to believe that the communication (which, in that case, was voluntarily made, without inquiry or solicitation,) was made in order to injure the defendant, but the case turned mainly on the inquiry, whether, in truth, any damage had resulted therefrom to the plaintiff, (whose wife was the subject of the alleged libel,) and whether her alleged dismissal from service was not merely colorable, and done for the express purpose of bringing the action; and a communication not invited by any previous inquiry, is far more liable to suspicion of malice, than one made in response to inquiries proper to be made, and to which it is the defendant's duty to reply. (See *Pattison v. Jones*, 8 Barn. & Cres. 578.) In *Rogers v. Clifton*,

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(3 Bos. & Pul.,) the plaintiff proved the communication to be false, under circumstances indicating that the defendant knew the falsehood of his own statements, and that the defendant acted officially in making it.

On the other hand, cases are numerous in which the plaintiff has been non-suited. In *Weatherstone v. Hawkins*, (1 T. R. 110,) the verdict for the plaintiff, founded on the mere words of the communication, was set aside, and judgment ordered for the defendant. In *Child v. Affleck*, (9 Barn. & Cres. 403,) a non-suit was ordered at the trial, and sustained after argument at bar. And in this State, in *Vanderzee v. McGregor*, (12 Wend. 545,) the communication being in its nature privileged, the Court determined the question, whether there was evidence sufficient to be submitted to the jury, on the question of malice, and ordered a non-suit, which was sustained.

The judgment should be affirmed.

Judgment affirmed, with costs.

HERMAN HUTTEMEIER, Plaintiff and Respondent, v. BENJAMIN ALBRO, Defendant and Appellant.*

J. B. was the owner of several contiguous lots, fronting on a public street, running to the corner formed thereby with an intersecting street, and, also, of the contiguous lots in the rear, fronting on the cross street; and for 40 years prior to his death, he had used an alley-way, running from such cross street, along the rear of the first-named lots, as a means of access and egress from and to the rear of such lots, upon the rear of one of which was a small house, let from time to time, to various tenants, who used the alley-way.

After the death of J. B. the premises continued to be so used for several years, and one of the lots was leased, by the heirs, for five years, and was described in the lease, as bounded northerly, in the rear, by an alley for the use of this lot in common with the lot adjoining. This lease, by assignment, came to the plaintiff. Afterwards, during the term of the lease, partition was voluntarily made by such heirs, and in conveying the said lot to the one to whom it was allotted, it was described in the deed, as "running to the southerly side of the alley-way, and thence southeasterly, along the said alley-way, 21 feet 10 inches," and it was conveyed, "together with all and singular the appurtenances," etc. The

* Affirmed in the Court of Appeals, October, 1858. 18 N. Y. R. 48.

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- lot was thereafter, before the expiration of the lease, conveyed in the same terms by such grantee, to the plaintiff, the tenant in possession.
- After the expiration of the lease, the defendant, a grantee of other of the heirs, closed the alley by an erection on the line of the cross street.
- Held, in an action to compel the removal of the obstruction, and for damages,
1. No easement was created, during the life of J. B., which would pass to the grantees of one of the lots by mere force of the word "appurtenances" in the deed from the heirs-at-law, so as to give such grantee a right to use the alley-way. No one can be said to have an easement in his own land, and no right of way could exist, as such, so long as the title to the alley and the contiguous lots, was vested in fee in the same person.
 2. The conveyance made on the partition of the lots, describing one of them as running to the alley, and running along the alley, in connection with the actual use of such alley at that time, and for many years before, as a way of ingress and egress from and to such lot, are sufficient to show an intent to create the easement, and to confer the right of way on the grantee, who thereby acquires an easement in the alley, which, in turn, passes to his grantee.
 3. Where a lot is conveyed which has a front bounding on a public street, the grantee does not take "a right of way by necessity," through an alley lying at the rear of the lot, although there be on such rear a dwelling house, and the grantor has, for forty years, used the alley as a way of ingress and egress for his tenants in such house.

(Before DUX, Ch J., and WOODRUFF, J.)

Heard, Oct. 23d, 1857; decided, March 6th, 1858.

THIS action is brought to compel the defendant to remove from an alley-way running along the rear of the plaintiff's lot, No. 108 Division street, a shed and other obstructions, erected by the defendant, at its outlet to Eldridge street, and to pay to the plaintiff damages for obstructing his use of such alley, as a passage for ingress and egress from and to the plaintiff's lot.

The defendant denied that the plaintiff had any right to use the alley, and set up title in himself in the alley in fee.

The action was once tried in this court, and judgment was rendered for the plaintiff, but on appeal to the Court of Appeals, the facts proved were not deemed sufficient to establish a title to the alley or to the use thereof in the plaintiff, and a new trial was ordered.

The case then came on for trial before Mr. Justice Bosworth without a jury. The facts proved appear by a condensed statement of his finding upon the evidence.

The location of the plaintiff's lot and of the alley, and also of the other lots bounding on the alley, is shown on a diagram as follows:—

ELDRIDGE STREET.

	86.6	3.	20.1	20.1
No. 106.		0.10		
	75.4	21.0		
No. 108.		0.10		
	64.2	21.0		
	67.2	0.10		
No. 110.		0.10		
	56.	20.1		
DIVISION STREET.				

First. The lot known as No. 108 Division street, in the plaintiff's complaint mentioned, together with lots 106, 110 and the alley-way, and also No. 8 Eldridge street, were owned by John Beekman for some forty years prior to and down to the time of his death, which occurred in December, 1844.

He died intestate, and left him surviving, Mary Elizabeth, his widow, and six children, viz.: Catharine B. Fish, widow; Mary, wife of Wm. A. De Peyster; Jane, wife of Jacob H. Borrowe; Lydia, wife of Joseph Foulke; Wm. F. Beekman and John C. Beekman, his only heirs-at-law.

Second. In the rear of said lot, No. 108 Division street, there was an alley-way, three feet wide, extending from lot No. 110 Division street to Eldridge street, bounded on one side by lots numbered 110, 108, and 106 Division street, and on the other side by lot No. 8 Eldridge street. This alley-way was used by the tenants and occupants of 110 and 108 Division street and No. 8 Eldridge street, during the time said John Beekman owned said lots, and also after his death, until, in May, 1848, when it was closed by the defendant.

While this alley-way was so used, there was a small wood

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tenement house on the rear of lot No. 108 Division street, the property of the tenant, the only access to and egress from which was through said alley-way, from and into Eldridge street.

Third. By an indenture of lease, dated the 30th of April, 1845, executed by all the heirs of said John Beekman, deceased, as parties of the first part, and Ann Hunniford, widow, as party of the second part, the said parties of the first part demised to the said party of the second part, the said lot No. 108 Division street, for five years, from the first day of May next after its date. The said lease described the demised premises as bounded southerly, in the front, by Division street; northerly, in the rear, by an alley of three feet in width (for the use of this lot in common with the other lot adjoining); easterly, on one side by lot No. 110; and westerly, on the other side, by lot No. 106; containing in breadth in front, on Division street, as the bevel runs, twenty-four feet seven inches; in the rear, along the alley aforesaid, twenty-one feet ten inches; and in length, on the easterly side, sixty-one feet; and on the westerly side seventy-five feet eight inches, be the same more or less, and contained the usual habendum, "To have and to hold the said demised premises with the appurtenances," etc.

Fourth. The said Ann Hunniford, on the 13th of January, 1847, by an instrument in writing, signed by her and sealed with her seal, assigned the said lease and her interest by virtue thereof in the said demised premises to the plaintiff.

Fifth. By a deed dated January 9th, 1847, and acknowledged the 11th and recorded the 14th of said January, the said widow of John Beekman, and all of his said heirs except Lydia Foulke, conveyed to the said Lydia said lot 108 Division street, granting the premises conveyed in the following words of description:—

"All that certain piece, parcel, or lot of ground situate and being in the Tenth Ward of the City of New York, on the northerly side of Division street, known as street number (108) one hundred and eight Division street, distant twenty-four feet and seven inches easterly from the easterly corner of Division and Eldridge streets, and running thence north-easterly in a straight line seventy-five feet and four inches to the southerly side of an alley-way three feet wide; thence south-easterly along

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the said alley-way twenty-one feet and ten inches; thence south-westerly in a straight line sixty-four feet and two inches to the said side of Division street; and thence westerly along the same twenty-four feet and seven inches, to the point or place of beginning. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining."

Sixth. By a deed also dated January 9th, 1847, and acknowledged the 11th, and recorded the 14th of said January, the said widow of John Beekman, and all of his said heirs except the said Jane H. Borrowe, conveyed to the said Jane H. Borrowe said lot No. 106 Division street, bounding and describing it thus:—

"Beginning at the said easterly corner of Eldridge and Division streets, and running thence easterly along Division street twenty-four feet and seven inches; thence northeasterly, and parallel with the east side of Eldridge street seventy-five feet and four inches to the easterly side of an alley-way three feet wide; thence north-westerly along the same twenty-one feet and ten inches to the said side of Eldridge street, and thence south-westerly along the same eighty-six feet and six inches to the said easterly corner of Eldridge and Division streets, the place of beginning. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining."

Seventh. By a deed also dated the 9th of January, 1847, acknowledged the 11th, and recorded the 14th of said January, the said widow of John Beekman, deceased, and all the said heirs, except Mary De Peyster, conveyed the lot No. 110 Division street, and also the lot No. 8 Eldridge street, to John C. Beekman, trustee, the material parts of the description of lot No. 110, being:—

"Beginning at a point on the said side of Division street, distant forty-nine feet and two inches easterly from the easterly corner of Eldridge and Division streets, and running thence northeasterly and parallel with the easterly side of Eldridge street, sixty-seven feet two inches; thence southeasterly and at right angles with the last-mentioned line, twenty-one feet two inches; thence south-westerly and parallel with said side of Eldridge street, fifty-six feet to the said northerly side of Division street;

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and thence westerly along the same twenty-four feet seven inches, to the point or place of beginning. Together," etc.

"And as to lot No. 8, beginning at a point on the said side of Eldridge street, distant eighty-nine feet six inches north-easterly from the easterly corner of Division and Eldridge streets, and running thence southeasterly on a line at right angles, or nearly so, with the said side of Eldridge street, sixty-five feet six inches; thence northeasterly and parallel, or nearly so, with the said side of Eldridge street twenty feet; thence northwesterly and at right angles, or nearly so, with the last-mentioned line sixty-five feet six inches, to the said side of Eldridge street; and thence southwesterly along the same twenty feet one inch to point or place of beginning. Together, etc."

Eighth. The said Borrowe and wife, on the 22d of June, 1847, mortgaged to John C. Cheeseman the lot No. 106 Division street, to secure the payment of the sum of \$3500, by precisely the same words and description as are contained in the deed of the same lot from the widow and heirs of said John Beekman, deceased, to the said Jane H. Borrowe.

Ninth. The said Jacob H. Borrowe and his said wife, by a deed, dated the 25th of February, 1848, and acknowledged and recorded on the first of March, 1848, conveyed to the defendant Benjamin Albro, subject to the said mortgage, the lot No. 106 Division street, the material parts of the description being:—"Beginning at the said easterly corner of Eldridge and Division streets, and running thence easterly along Division street twenty-four feet and seven inches, thence northeasterly and parallel with the east side of Eldridge street seventy-five feet and four inches to an alley-way three feet wide, thence northwesterly along the same twenty-one feet and ten inches to the said side of Eldridge street, and thence southwesterly along the same eighty-six feet and six inches to the said easterly corner of Eldridge and Division streets, the place of beginning, subject, nevertheless, to the above mortgage, etc."

Tenth. By a deed also dated the 25th of February, 1848, and acknowledged and recorded on the 1st of March, 1848, the said Borrowe and wife "remised, released and quit-claimed" to the defendant Albro, all their right, title and interest in the said alley-way, which is described in the instrument as follows:—

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"All the right, title, and interest of the said parties of the first part, of, in, and to a certain alley-way, described in a certain indenture, bearing date the ninth day of January, eighteen hundred and forty-seven, between Mary Elizabeth Goad Beekman, of the said city, widow, of the first part, William F. Beekman and Catharine his wife of the second part, William A. De Peyster and Mary his wife of the third part, John C. Beekman, trustee of Mary De Peyster of the fourth part, John C. Beekman of the fifth part, Catharine B. Fish of the sixth part, Joseph Foulke, Jr., and Lydia his wife of the seventh part, and the said Jane Borrowe, wife of Jacob H. Borrowe, of the eighth part, and recorded in the office of the Register of the City and County of New York, in Liber 485 of Conveyances, page 274, January 14th, 1847, as 'an alley-way three feet wide,' and adjoining certain property on the easterly corner of Eldridge and Division streets, granted and conveyed by the said Jacob H. Borrowe and Jane his wife to the said Benjamin Albro, by deed bearing date herewith."

Said Foulke and wife, by a deed dated the 2d of March, 1848, and acknowledged and recorded on the 11th of said March, conveyed to the plaintiff the said lot, No. 108 Division street, the premises thereby conveyed being described in such deed, in the same words as in the aforesaid conveyance thereof, to the said Lydia Foulke.

In May, 1848, the defendant tore down the old building which stood on No. 106 Division street, and erected a new building thereon, and finished the same in the course of that season. He closed up the entrance to the alley-way, on Eldridge street, in May, 1848, and has kept the same closed since.

Soon after the same was so closed, the occupants of the building on the rear of No. 108 Division street quit the same.

While the defendant was rebuilding on the lot 106 Division street, the plaintiff made material alterations in the building in the rear of 108 Division street, and fitted it up for the manufacturing of candies, etc., and made an entrance to it from Division street.

The uses for which he fitted and to which he applied the said rear building, made its use as valuable to him as the renting of it had previously been.

The plaintiff made no complaint to the defendant at the time,

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on account of the closing of the alley-way, nor did he make any complaint of, or objection to such conduct, until at or about the time this action was commenced.

The building on the rear of 108 Division street rented, prior to the closing of the alley-way, at the rate of about \$125 per annum.

By the closing of the alley-way the plaintiff was deprived of the use of this building, in the manner it had been previously used. He lost the use of it until he had altered it, and converted it to other uses.

The damage sustained by the defendant, if he is entitled to recover in this action, is seventy-five dollars, with interest thereon, from the commencement of this action, to this date, amounting, in all, to the sum of one hundred and six dollars and fifty-nine cents.

On the foregoing facts, the Court found the following conclusions of law:—

First.—The deed of the 9th of January, 1847, to Lydia Foulke, from the other heirs and the widow of John Beekman, deceased, of lot No. 108 Division street, conveyed as an incident and appurtenance to the lot itself, a right to the use of the alley-way, as it had been, and was then used.

Second.—The deed from Lydia Foulke and her husband to the plaintiff, of the same lot, conveyed to the plaintiff the same right.

Third.—The plaintiff is entitled to a judgment against the defendant for the said sum of one hundred and six dollars and fifty-nine cents, together with the costs of this action, and to a further judgment that the defendant remove from said alley-way all obstructions to the free use thereof, as it had been used prior to the 2d of March, 1848; and that he refrain from interfering or intermeddling with the rights of the plaintiff to the free and unobstructed use thereof, in the manner and for the purposes for which it had been used prior to the time last aforesaid.

The defendant duly excepted to the conclusions of law and the final decision.

Judgment was entered for the plaintiff, in conformity with the decision; and the defendant appealed to the General Term.

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Waldo Hutchins, for the defendant (appellant).

I. The Judge erred in finding, as a conclusion of law, that the deed of the 9th of January, 1847, to Lydia Foulke, from the other heirs and the widow of John Beekman, deceased, of lot No. 108 Division street, conveyed as an incident and appurtenance to the lot itself a right to the use of the alley-way, as it had been and was then used. 1. No such right existed as a way of necessity. (Opinion of Selden and Johnson, Court of Appeals.) Neither did it exist by prescription founded on an adverse use of more than twenty years. 2. To warrant a presumption of the grant of an easement, the use of twenty years must have been continuous and adverse. (*Colvin v. Burnell*, 17 Wend. 564; *Hart v. Vose*, 19 Wend. 365.) 3. Neither did it exist by grant. (Opinion Judge Johnson, Court of Appeals.)

II. The right could not have existed while the title to the lot and the alley-way was vested in the same person. (Coke Litt. 114, B.; *Cooper v. Barber*, 3 Taunt. R. 99; 2 Black, Comm. Ch. 11; *Grant v. Chase*, 17 Mass. 443; Opinions of Justices Selden & Johnson, Court of Appeals; *Jackson ex dem Yates v. Hathaway*, 15 Johns. R. 447.)

III. To entitle the plaintiff to a recovery he must show the creation of the easement upon some severance of the ownership of the two tenements. (Opinion of Judge Selden.)

IV. No existence of an easement in this case has been established. The deed to Mrs. Foulke describes the lot bounding it upon one side "along an alley-way," while in the conveyances of lot No. 110 Division street and No. 8 Eldridge street, the tenants of all of which, together with those of No. 108, had had the use of the alley-way during the lifetime of John Beekman, the alley-way is not referred to.

V. General words, such as "appertaining," "belonging," etc., are not sufficient to pass the right of way upon a severance of the tenements. (*Whalley v. Thompson*, 1 Bos. & P. 371; *Kooystra v. Lucas*, 5 B. & Ald. 830; *Jackson v. Hathaway*, 15 Johns. 447; *Staple v. Hayden*, 6 Mod. 1; *Grant v. Chase*, 17 Mass. 442.)

H. M. Ruggles, for the plaintiff (respondent).

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I. If the heirs of John Beekman had conveyed the plaintiff's lot, with its appurtenances, to a third person, the right to the continued use of the alley would have passed to the grantee. (*Staple v. Heyden*, 6 Mod. R. 1, 4; *United States v. Appleton*, 1 Sumnor, 492; *Huttemeier v. Albro*, Court of Appeals.)

II. The deed from the other heirs and the widow of John Beekman to Mrs. Foulke, had the same effect; and the conveyance from her and her husband to the plaintiff, gives him the same right, and entitles him to the unobstructed use of the alley.

III. The judgment should be affirmed.

BY THE COURT. WOODRUFF, J.—It is possible that the views expressed in the opinion given by Mr. Justice Selden, when this case was before the Court of Appeals, and which are especially applicable to the case as now before us, might have been withheld, and yet the same judgment of reversal have been pronounced. In this sense a portion of his opinion may be deemed *obiter*.

But that opinion was written with a view to the new trial which was ordered, and was evidently intended as a guide to this court in the further conduct of the cause. And bearing this in mind, we ought, perhaps, to presume that the observations he made had the sanction of the other members of the court, although not specifically adverted to by Mr. Justice Johnson in his opinion.

If, therefore, we did not concur in those observations, we should hesitate very much before coming to a conclusion, based upon opinions opposed to that which may properly be regarded as our guide to a new trial, and judgment.

But upon the whole case we concur with Mr. Justice Selden in the result at which that portion of the opinion to which we refer would have led him, had the case, as now developed, been before that court.

We observe, however, preliminarily, that the Court of Appeals must be deemed to have decided, that the plaintiff herein has no right of way, by necessity, over or through the alley, the obstruction of which he complains of. So far as that question is involved, the case has not been altered in any material particular. Nor has he a right of way founded in prescription, nor on an adverse user. Nor could the right of way exist as an easement while the title to the alley, and the title to the several contiguous lots, was vested in

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the same person. No one can be said to have an easement in his own land. And where an easement has existed, it ceases when the title to the easement and the title to the land are united in the same person.

If, therefore, the easement exists, and is vested in the plaintiff, as the owner of one of the lots adjacent to the alley, it must have been created in some manner, subsequent to the death of John Beekman, who died seized of the whole of the premises in fee. But in determining whether or not the acts of John Beekman and his heirs were such that the conveyances by the heirs would operate, as between themselves and in favor of subsequent grantees, to create the easement and pass a right of way as an appurtenant to the several lots bounded thereon, the fact is of great importance, that the alley had been used as a way of ingress and egress to and from the several lots, for more than forty years prior to the death of John Beekman, in 1844, and continued to be so used until, and after the division of the property among his heirs, and thereafter, until the defendant, in 1848, made the obstruction which is the cause of the present action. And upon the rear of the lot now of the present plaintiff there was, during all this period, a dwelling house, the property of the tenant, the only access to and egress from which was through said alley-way from and into the public street, (Eldridge street) and the alley was used for such access and egress by the tenants and occupants of such house.

The opinion of Mr. Justice Selden, in the Court of Appeals, is explicit in regard to the effect and operation of such facts as these, followed by conveyances apt in form to transfer the right to a continuance of such a use.

He says:—"The owner of several tenements may, of course, make such a disposition of their respective properties as he pleases. He may take, from either, any one of its qualities, or any use of which it is susceptible, and annex it to another; so that such quality or use shall become part and parcel of the latter, thus rendering the one tenement, *pro tanto*, subservient to the other; and there is no doubt, that where an owner has chosen thus to make an artificial distribution of the natural properties of two tenements, making use of the one as subservient to the other—if, while this use and his ownership of both tenements continues, he sell and convey the dominant tenement, with its

appurtenances, there being, at the time, open and visible marks of such use, an easement, corresponding to the use, will be created, and will pass by the deed as an appurtenance. In this case, there was abundant proof of the use of the alley, in connection with the plaintiff's lot, for many years, with the consent of the owner of both tenements, and an apparent continuance of this use, up to the time of the conveyance by Foulke and wife to the plaintiff, accompanied by the necessary outward and visible marks of such use. But it does not appear that Foulke and wife were the owners of the alley when they executed the deed. The ownership by them of both tenements, was, of course, essential to the creation of the easement as an appurtenance, at that time. . . . It may, however, have been created upon some previous severance of the ownership of the two tenements, as upon the partition of the premises between the heirs of John Beekman, in which case it would have passed, by the deed of Foulke and wife, as appurtenant to the lot. As against Foulke and wife, the plaintiff has shown, I think, a clear right to the use of the alley; but, as against the other heirs of Beekman, or their grantees, he has shown none at all. If either the title to the alley itself, or a right to its use, in connection with lot 108, was conveyed to Foulke and wife by the partition deed, then such right passed as an appurtenance by the deed to the plaintiff."

The application of these views to the case, as exhibited on the second trial, is quite obvious. The title to the alley and the several contiguous lots, was in the heirs of John Beekman; their deed to Mrs. Foulke is now produced, and is in the very words of the deed afterwards executed by Foulke and wife to the plaintiff. The latter deed, in connection with the previous user, and the continued outward and visible marks of such use, is, in the opinion quoted, deemed sufficient to have vested in the plaintiff the right of way, had Foulke and wife then owned both the alley and the premises described.

By the same rule, the conveyance by the heirs, who did own both, must, in connection with the same extrinsic facts, be deemed to vest in Mrs. Foulke the right to the use of the alley, as an appurtenant to the premises granted; and the same, therefore, passed to the plaintiff, by the conveyance of the latter to him.

We are not inclined to rest this view of the effect of the deed

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to Foulke and wife, upon the mere force of the word "appurtenances," in that deed. The right of way did not exist, as an easement, so long as the title to the lot (108) and the alley were both vested in the heirs of Beekman; and if the alley was not mentioned or referred to in the deed, in any manner other than by the word "appurtenances," we should deem it at least doubtful whether the Court of Appeals intended to hold, that the previous use of the alley had so detached it from the other lots, or attached it to the plaintiff's lot, that it would pass by the mere force of that term. (1 Bos. & Pul. 371; 5 Barn. & Ald. 830; 1 Taunt. 206.)

But the conveyance to Foulke and wife, describes the premises as running "along the said alley-way."

In *Herring v. Fisher*, (1 Sand. S. C. R. 344,) such terms were held to be sufficient to convey the fee to the centre of the road; and it was also held, that even if the point whence the boundary run along the road, was described as "at the side of the road," (as, in the case before us, the precise line is described as running to the easterly side of the alley,) the same construction would prevail. And see *Badeau v. Mead & Holmes*, (14 Barb. 328;) and also, *Sizer, et ux, v. Devereux*, (16 Barb. 160,) and cases cited in these cases, respectively. (*Smiles v. Hastings*, 24 Barb. 44.)

It is sufficient for the purposes of this case, that, by the deed from the heirs of Beekman, Foulke and wife obtained the right to use the alley, as such.

The judgment should be affirmed.

GARRETT D. CLARK, Plaintiff and Appellant, v. WILLIAM H. GRIFFITH and LEVI DECKER, Defendants and Respondents.

1. The defendants, on the 25th of August, 1858, sold to D. & F. four billiard tables, for \$1100, taking ten notes, of \$100 each, at 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 months, and a note made by one Clark, and a mortgage of the four tables, to secure the payment of the notes made by D. & F., (the mortgage providing, that on default to pay either of those notes, all the notes should be due, and the mortgage might be foreclosed;) and agreed, in writing, that, "after \$300 has been paid of said notes," to "give a receipt in full for one table, and so continue

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- until all are paid." On the 14th of January, 1856, the defendants signed and delivered to D. & F., a paper, which states, that they had received from D. & F., \$275, "for one billiard table; said table being one of the four tables included in a mortgage given by said D. & F."
2. In March, 1856, D. & F., not having paid more, the defendants foreclosed the mortgage, sold and, at the sale, bought all of the tables; and, on the 8th of September, 1856, the plaintiff, who had succeeded to the rights of D. & F., demanded of the defendants one of the four tables, (who refused to deliver it); and thereupon brought an action of trover to recover its value.
3. Held, that on such a state of facts, the plaintiff could not maintain such an action; and that his complaint was rightly dismissed at the trial.
4. An acceptance of the purchase-price of one table, does not bind the mortgagor, (holding a mortgage for the purchase-money of four tables,) to give up or release either table, until the whole is paid; or, if he have agreed to release one on payment of \$300, then, until the whole \$300 is paid.
5. When a mortgagor has agreed to release one of several chattels mortgaged, on payment of a specified portion of the debt, an agreement made by him, on payment of a lesser portion of the debt, (the sum paid having, in fact, become payable,) to release one of the mortgaged chattels, is without consideration, and void.

(Before HOFFMAN, WOODRUFF and PIERREPONT, J. J.)

Heard, Feb. 2d; decided, March 6th, 1858.

THIS action comes before the Court on two appeals taken by the plaintiff, one being from an order denying a motion made by him for a new trial, and the other being from a judgment, upon an order, dismissing his complaint, made at the trial. It was tried on the 22d of June, 1857, before Mr. Justice Woodruff and a jury.

The complaint states, as a cause of action, "that about the 1st of March, 1856, a certain billiard-table and four ivory balls, and a lot of cues and counters belonging thereto, the property of the plaintiff, and to the possession of which the plaintiff is entitled, of the value of \$275, came into the possession of the defendants. That on or about the 8th of September, 1856, the plaintiff being then the owner, and entitled to the possession of the said property, demanded the same of the defendants, who refused to deliver the same to the plaintiff, but have wrongfully converted and disposed of the same to their own use, to the plaintiff's damage \$300. Wherefore plaintiff demands judgment, that he recover of the defendants \$300 damage, besides costs."

The answer denies that the billiard-table, etc., was, on the 1st of March, 1856, the plaintiff's property, or that he then was, or

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since has been, entitled to the possession thereof, or that they have wrongfully converted and disposed of the same to their own use, or that it was worth \$275, or that plaintiff has sustained \$300, or any damage.

It sets up a sale by them, on the 25th of August, 1855, to John E. Dean and Thaddeus G. Finnegan, of the property mentioned in the complaint, and of three other billiard-tables and their appurtenances, and that Dean and Finnegan, towards the payment therefor, delivered ten promissory notes of that date, of \$100 each, to the defendants, made by Dean and endorsed by Finnegan, at one, two, three, four, five, six, seven, eight, nine, ten, and eleven months from their date, and to secure the payment thereof, at the same time executed and delivered a chattel mortgage of the said four billiard tables and appurtenances.

That the mortgage provided, that on a default to pay either note, all should become due, and the mortgagees might take and sell the property. That said mortgage was duly filed, stating the time and place. That on the 1st of March, 1856, Dean and Finnegan had failed to pay three of the notes, which matured before that day, and thereupon the defendants elected to consider all the notes due, and took and duly sold the property under the mortgage, for the best price which could be obtained therefor.

The case, containing the proceedings at the trial, is in these words, that is to say:—

"It was proved on the trial that on the 25th of August, 1855, the defendants sold and delivered to John E. Dean and Thaddeus G. Finnegan, keepers of a billiard saloon, at 598 Broadway, New York, four billiard-tables, with the balls, cues and maces appertaining thereto, and on the sale, executed and delivered to Dean & Finnegan a bill of sale, in the words following:—

'NEW YORK, August 29th, 1855.

Meests. Dean & Finnegan

Bought of Griffith & Decker,

Four billiard tables and fixtures, \$1100.00

'Received payment by ten notes, made by John Dean, endorsed by T. G. Finnegan, and one note made by G. D. Clark, payable to his own order, and endorsed by J. E. Dean and T. G. Finnegan.

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'After three hundred dollars has been paid of said notes, then we, Griffith & Decker, are to give a receipt in full for one table, and so continue until all paid. GRIFFITH & DECKER.'

And at the same time Dean & Finnegan executed and delivered to the defendants the notes therein mentioned, and a chattel mortgage, dated August 25th, 1855, and executed under the respective hands and seals of said Dean & Finnegan, (and filed on the 31st day of August, 1855, as required by Statute,) to secure payment of the ten notes described in said bill of sale, of \$100 each, made by John E. Dean, and endorsed by Thaddeus G. Finnegan, upon the billiard-tables, balls, cues, etc., and other property; the mortgage was in the usual form, and conditioned to pay the said ten notes, and if any one or more of the said ten notes were unpaid, the whole of them should become due at the election of the defendants. On the 7th of September, 1855, Dean & Finnegan executed and delivered to the plaintiff a chattel mortgage (in the usual form, also duly filed the same day, as required by law,) upon the same property covered by the mortgage to the defendants, conditioned to pay the plaintiff one thousand dollars on or before the 7th day of September, 1856, and was expressed to be subject to Dean & Finnegan's mortgage to the defendants.

In both mortgages was a clause that until default in the condition, Dean & Finnegan should remain in possession of the property mortgaged, and it appeared that they did remain in possession, at No. 598 Broadway, in the City of New York, from the date of the first mortgage until the 14th day of March, 1856.

It was also proved that Dean & Finnegan paid the first two of the notes mentioned in the bill of sale and mortgages, and that the note of G. D. Clark therein mentioned was also paid, and that therefor the defendant executed and delivered to Dean & Finnegan, on the day of its date, the following paper, viz.:—

"\$275.00

NEW YORK, Jan'y 14, 1856.

Received from Dean & Finnegan, two hundred and seventy-five dollars, for one billiard table; said table being one of the four tables included in a mortgage given by said Dean & Finnegan.

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But at the time this paper was given, or at any other time, no particular table of the four was selected or identified.

It was further proved that after the last paper was given, as above stated, and on the 18th day of February, 1856, the plaintiff purchased all the right, title, and interest of Dean in the four billiard-tables, cues, maces, etc., which right, title, and interest was at that time sold by the Sheriff of the City and County of New York, under an execution issued and delivered to him upon a judgment in this Court against Dean and one Deagle, in favor of the plaintiff in this action, for \$637.97; docketed in the same county, the 6th day of February, 1856. And the execution was issued to the Sheriff on the 6th day of February, 1856. And in the month of April, 1856, Finnegan assigned to the plaintiff all his right, title, and interest of, in and to the same billiard-tables, cues, maces, etc.

On the 14th day of March, 1856, others of the notes being past due, the defendants, under their mortgage elected to consider the whole amount due, and as stated in their answer, seized and sold all the four billiard-tables, cues, maces, etc., which were at the sale bought in for the defendants, and came into their possession.

The complaint alleges that on the 8th day of September, 1856, (after the plaintiff's mortgage became due,) the plaintiff demanded of the defendants one of the billiard-tables, cues, maces, etc., and that the defendants refused to deliver the same to him, which is not denied in the answer.

This action was commenced on the 15th day of September, 1856.

The Court, after the foregoing facts were proved, dismissed the complaint on the motion of the defendants' counsel, and the plaintiff excepted.

On this case, the plaintiff moved at Special Term, before Mr. Justice Hoffman, on the 5th of October, 1857, for a new trial, which motion was denied. On the 19th of October, 1857, judgment was entered in favor of the defendants, and from that judgment, and from the order of the 5th of October, the plaintiff appealed to the General Term.

A. R. Dyett, for plaintiff, the appellant,

Argued, among other propositions, the following:—

I. The bill of sale from defendant to Dean & Finnegan passed the title of the four billiard-tables to them. The simultaneous mortgage by Dean & Finnegan to the defendants transferred the title again to the defendants, subject only to be defeated by the performance of the condition of the mortgage. The agreement at the foot of the bill of sale, was a part of the transaction, and all read together; the only effect that can be given to it, is an agreement to release each table from the mortgage as paid for, until all are paid for and released.—(*Rogers v. Kneeland*, 13 Wendell, 114.) The receipt operated as a discharge of one of the billiard-tables from the mortgage; and thereupon Clark, both as assignee of the rights of Dean & Finnegan, and as mortgagee in his own right, became entitled to it.

II. The receipt was given in performance of an agreement, and the defendants cannot avail themselves of a defective performance on their part, to deprive us of the billiard-table, for which they have been paid.

III. It is of no consequence, that no table was selected when the table was released from the mortgage. It must be remembered that Clark sues as the assignee of Dean & Finnegan's rights, as well as in his own right as mortgagee. 1. The vendee had the right of selection at any time, and was deprived of the exercise of it by the wrongful act of the defendants, of which they cannot avail themselves. The price had been paid, and the table delivered, because the four tables all had previously been delivered to Dean & Finnegan, and were then in their possession. There was nothing to be done to complete the transaction, not even delivery, and the property passed to Clark. (*Olyphant v. Baker*, 5 Denio, 879; *Benedict v. Field*, 4 Duer, 158.) 3. There being no selection of any table at the time of the release of one of them, and Dean & Finnegan being in possession at that time, they had a right to retain possession of all four tables, until either the defendants made the selection, or called on Dean & Finnegan to make it. The defendants having taken and converted all the tables without any such selection, Clark, as assignee of the rights of Dean & Finnegan, was entitled to the possession of, and might have sued for all four tables. He might therefore properly sue for one, to the possession of which he was entitled. This was also sufficient to sup-

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port the allegation of property. Again, if it was uncertain which table was released, it was equally uncertain which three remained covered by the mortgage, and the defendants thus by their own act, and neglect to select a table, confused their remedy, and rendered their mortgage so uncertain as to be incapable of enforcement, and for that reason void, and they, therefore, had no right to take any of the tables—at least before making a selection.

IV. By the release of one of the four tables without designation, Dean & Finnegan, (and Clark, by assignment from them,) became tenants in common with the defendants, in the four tables; and by selling the whole, the defendants became liable in trover (for a conversion of the property,) to the extent of the interest of the tenant in common. (*Heyl v. Burling*, 1 Caines' R. 14; *Selden v. Hickock*, 2 Caines' R. 166; *Wilson v. Reed*, 3 Johns. R. 175; *White v. Osborn*, 21 Wendell, 72; *Hyde v. Stone*, 9 Cowen, 280; *Sheldon v. Skinner*, 8 Wendell, 525; 1st Chitty's Pleadings, page 147, etc.)

V. The defendants, by seizing and selling the four tables, so mixed up the plaintiff's property with theirs, that they are liable in trover, even if they mixed the property by common consent. (*Nowlen v. Colt*, 6 Hill, 461.)

VI. By seizing the four tables, the defendants were trespassers as to all the tables, and we had a right to waive the tort as to three, and sue for one of them.

VII. If there be any technical difficulty about maintaining what formerly was trover, or trespass upon the complaint, the answer of the defendant sets up their defence fully, and all the facts were proved on the trial without objection. It is very obvious that, before the Code, we might have recovered the value of one billiard-table, (which we sue for,) in a special action in the case at law, or by a bill in equity, if we had no remedy at law. We certainly had a right to call upon the defendants to make a selection or permit us to do so, and to deliver us the selected table, and upon failure to do either, they were liable to us for the value of one of the tables. Our demand of one of the tables is the same in effect, and our complaint is literally true. The theory of the Code evidently is, that where all the facts are before the Court, if upon those facts the plaintiff, in any form of action at law or in equity, would be entitled to relief, that he shall

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have it, irrespective of the form of the pleadings. If it is necessary, the Court should conform the complaint to the facts proved, or amend the complaint.

VIII. The nonsuit should be set aside, and a new trial granted.

P. T. Woodbury, for respondents (the defendants).

I. The receipts of August 29th, 1855, and January 14th, 1856, do not show an agreement, that as the tables were paid for they were to be released from the lien of the mortgage.

II. The receipt of January 14th, 1856, did not operate as a release of any particular one of the four tables from the lien of the mortgage, or as a transfer of the interest of defendants therein. 1. No particular one of the tables was ever selected or identified, either in the receipt or otherwise, as the one to be released, or as the one referred to in the receipt. There was, therefore, no evidence that the table demanded or sued for was the one released or referred to in the receipt. 2. The receipt was not under seal, and could not, therefore, operate as a release from the lien of the mortgage, which was under seal. (*Frink v. Green*, 5 Barbour Sup. Ct. R. 455; *Delacroix v. Bulkley*, 13 Wend. 71.) 3. The interest of the defendants was yet undivested, because the identification of a particular table to be transferred, was not yet made or attempted. So long as any thing remained to be done to the thing to be transferred, to identify it or discriminate it from others, no title passed. (1 Parsons on Contracts, 441.)

III. The demand, by the plaintiff, of a table, as admitted in the pleadings, did not operate as an identification or selection of any one of the tables as the one referred to in the receipt. 1. The question, which of the tables should be considered as the one to be released from the mortgage, or paid for in full, was to be settled by the concurrence of both purchaser and vendor. A mere demand of one particular table, by Dean & Finnegan, or their assignee, would not constitute such an identification. 2. There is no evidence that Dean & Finnegan, or the plaintiff, as their assignee, ever attempted to exercise this right, or ever called upon the defendants to concur with them in any such identification. 3. The proof is positive, that no such identification was ever effected. 4. Even if the demand is conceded to have been of one

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of the tables covered by the mortgage to defendants, and to have operated as an identification or selection of one which the plaintiff was entitled to have released, it was made too late, and after the defendants had foreclosed their mortgage and exercised the right, which they had at the time of such foreclosure, to sell all the tables. The foreclosure took place March 14th, 1856, and the demand was made September 8th, 1856.

BY THE COURT. PIERREPONT, J.—The plaintiff having rested his case, upon proving the facts above stated, the Judge dismissed the complaint; and we are called upon to say whether he committed an error.

We think that upon payment of \$300 by Dean & Finnegan, they were entitled to one of the tables discharged from the lien of the mortgage, and that they might have compelled a selection.

No claim was made for the delivery of any table until six months after they had all been sold under the mortgage; and not until more than six months after the plaintiff had acquired whatever rights he now has; and no one of the four has ever been selected, or in any manner identified as the one claimed by the plaintiff.

The mortgage covered the four tables, and when purchased it was as much a lien upon each as upon any one of the four, and a sale under the foreclosure gave to the *bona fide* purchaser a title to each of the four tables. The defendant cannot be said to have "wrongfully converted the property to his use;" and as the proofs now stand, the plaintiff is not entitled to the possession of any particular one of these tables any more than to each one of them; and as it is clear, that he is not entitled to each, and as he has shown no selection or claim to any particular one, we think the complaint was properly dismissed.

The Court are now asked, at General Term, to entertain an original motion to amend the complaint, and so to amend it as to render a new trial necessary, and to reverse the judgment for errors which do not now exist, and which errors are proposed to be created by the amendments.

We doubt any such jurisdiction in the Court, and we should be slow to exercise any such powers if clearly possessed.

No motion to amend was made below, and it is not proper for

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a Judge, on a trial, to volunteer and make amendments not moved by either party. (*Loyd v. Fox*, 1 E. D. Smith, 101; *Brown v. Colic*, 1 E. D. Smith, 265.) The plaintiff is not without remedy, if he brings a proper action sustained by sufficient proofs; but with no other evidence than this case presents, he must fail in a simple action for the conversion of personal property.

The judgment must be affirmed with costs.

WOODRUFF, J.—The mortgage executed by Dean & Finnegan to the plaintiff, on the 7th of September, 1855, being in terms subject to the prior mortgage given to the defendants, the plaintiff knew, when he purchased the interest of Dean, at the sale then made of it by the Sheriff, and also when, in the month of April, 1856, he took from Finnegan an assignment of his interest, that the defendants held a mortgage of the four tables, which was the first and a valid lien upon the property.

His purchase did not impair the rights of the defendants as mortgagees. (*Hull v. Carnley*, 1 Kern. 501; 17 N. Y. Rep. 202; *Manning v. Monaghan*, 1 Bosw. R. p. 467, note.)

The plaintiff's rights, on the 8th of September, 1856, when he "demanded of the defendants one of the billiard-tables, cues, maces," etc., were the same as the rights of Dean & Finnegan would have been had they made the same demand, not having executed a second mortgage, and their interest in the tables not having been sold by the Sheriff, or otherwise, to any one.

What, then, is the true construction of the instruments executed by the parties?

Dean & Finnegan, upon the purchase of the billiard tables, had executed and delivered to the plaintiff a mortgage to secure the payment of ten notes of Dean, endorsed by Finnegan, of \$100 each, parcel of the purchase-money.

The whole purchase-money, for the four tables, was \$1100, or \$275 for each table. By the terms and legal effect of this mortgage, the defendants acquired a title to the tables, as security for the whole sum of \$1000—*i. e.*, for the payment of all of the notes given therefor by Dean, endorsed by Finnegan, and of each of such notes; and they were not, by the tenor of the mortgage, bound to relinquish their lien upon any of the tables, until all of the notes were paid.

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But the memorandum, signed by the defendants at the foot of the bill of sale, is an agreement to give a receipt in full for one table, after \$800 has been paid.

Giving to this agreement the construction claimed by the plaintiff's counsel—and perhaps that is most in accordance with the intention of the parties—it was one of the terms of the purchase and of the mortgage, that when \$800 was paid by the purchasers, the defendants were to release one of the tables from the mortgage, and the purchasers, thereafter, to hold one table as their own absolute property.

The sale having been made at \$275 for each table, and \$300 being paid, the defendants would thus receive not only payment in full for the table so to be released, but would have \$25 towards payment for the other three; and when a further \$300 was paid, they would have \$50 towards payment for the remaining two, and so on. Their relative security would thus increase, as the tables were successively released. Such an arrangement was reasonable, and may, taking both instruments together, be treated as showing the whole intent of the parties.

The defendants could not, therefore, be required to give up any table until \$800 was paid; and, until \$300 was paid, they could retain their lien, and, in case of any default of payment, could foreclose and sell the four tables.

On the 14th of January, 1855, Dean & Finnegan paid to the defendants \$275.

Even if it be conceded, that the payment of \$800 would have the effect to discharge one table from the mortgage lien without any act of release by the defendants, in performance of their agreement, it is quite certain that payment of \$275 would not *per se*, have that effect, nor would it entitle Dean & Finnegan to have one of the tables designated as being so discharged. The amount had not been paid, which was required to entitle them to have one of the tables released, under the most favorable construction of the meaning and effect of the agreement of the 29th August, appended to the bill of sale.

It is claimed by the plaintiff, that the receipt given on the 14th of January, 1855, operated to discharge one table, so as to entitle him to maintain this action therefor. That paper, signed by the defendants, acknowledges that they have "received from Dean

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& Finnegan \$275, for one billiard-table, said table being one of those included in the mortgage," etc.

But this paper by no means necessarily operated to release any table from the mortgage. Had not the agreement of August 29th, 1854, been given, binding the defendants to release on the payment of a part of the purchase money, the payment for one, or two, or three of the tables would not have released them ; they would still be held, under the mortgage, until the fourth was also paid for ; and, under that agreement, the paper in question could have no greater effect, unless the whole \$800 was paid.

It was literally true, that on the 14th of January, the receipt of \$275 was payment for one table ; it was exactly the price at which it was sold, and that is all which this paper necessarily acknowledges.

It does not show an intent to alter or vary the conditions upon which, by the existing agreements, Dean & Finnegan were to have one of the tables released.

Indeed, the terms of this paper are susceptible of a still more restricted construction, viz.: that the money was received "on account of" one billiard-table ; it is not declared to be "in full for one table," as was provided in the agreement of August 29th ; but "for," i. e., towards, on account of, one table, or in part payment of the amount, upon payment of which Dean & Finnegan will be entitled to a release of one table.

But, in either aspect of the meaning of its terms, in this respect, it was not a compliance with the terms, on which alone one table was to be released. Those terms required the payment of \$300. The defendants were not bound to release the table, and did not release it.

And again. The defendants were not bound to release one table, unless, nor until, \$300 was paid. If the receipt given on the 14th of January, could be construed as an agreement to release one table from the mortgage, there was no consideration to uphold it. What was paid, (\$275,) was due to the defendants, and its payment was no sufficient consideration for an agreement, on their part, to relinquish any security they held for the payment of the balance. In this aspect, then, to hold the receipt to mean any thing more than "received on account of," or "towards," one table, (which, in the light of the original agreement, and all the

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facts, it may well mean,) would be so construing it, as to modify the original contract to the defendants' prejudice; and that, too, without any consideration paid to them therefor.

It may be, that if the \$300 had been paid, and the instrument of the 29th of August be so construed, that such payment would, *per se*, entitle Dean & Finnegan absolutely to have one of the tables released, it was the duty, as well as the right, of the defendants, to say which of the tables should be discharged; and that their foreclosing, and themselves purchasing and taking possession of the four tables, would not prejudice the rights of Dean & Finnegan to have such designation made. If so, then the demand made by the plaintiff on the 8th of September, 1856, may, perhaps, be deemed to require them to make a designation; and their unqualified refusal to deliver one table, may be taken as a denial of the plaintiff's right, and subject them to an action for its value.

But, under the views above expressed, the four tables continued mortgaged up to the time the defendants sold them, as absolutely and effectively as on the day the mortgage was executed; and, by the foreclosure of the mortgage, and the sale under it, the title of the defendants, as purchasers at such sale, became absolute, and the complaint was rightly dismissed.

Judgment affirmed.

DODGE, *et al.*, Receivers, Plaintiffs and Respondents, *v.* LAMBERT & GARDNER, Defendants and Appellants.

1. Where a lessee covenants, in the lease executed to him, for a particular use of the demised premises, equity will restrict him to that use by injunction.
2. Where the use sought to be enjoined, violates not only the covenant of the lessee, but the sanctity of the Sabbath, the interposition of the Court by injunction is eminently proper.
3. Where, by the terms of the lease, it cannot be assigned without the written consent of the lessors, and it is assigned by virtue of the written consent of a person professing to act as their agent; and as a consideration of obtaining such consent, the assignees covenant to make such use of the premises as their assignor had covenanted to make, and they enter upon the premises and occupy them solely by virtue of such consent and assignment; they cannot, in a suit

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- brought by the lessors against them to restrain them from using the premises for purposes other than those specified in their covenant, compel the lessors to prove that their professed agent was, in fact, such agent, having the powers which he assumed to exercise.
4. A suit by such lessors, to enforce the contract, is, as between them and such assignees, a ratification and adoption of the acts of such agent, and in such a case, sufficient evidence of his authority.
 5. In such an action, the defendants cannot show as against their landlords, that the latter have no beneficial interest or estate in the demised premises.
 6. It is no defense to such an action, that the use covenanted not to be made, and which the defendants are making, in violation of their covenant, is not a public or private nuisance; nor that such prohibited use will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant.
 7. A declaration of the agent, that his principals would not enforce such covenant, if no disorderly or improper conduct was permitted on the premises, is no defense to an action to enforce the covenant.

(Before BowWORTH, Woodsbury and Pierrepont, J. J.)

Heard, February 8; decided, March 18, 1858.

THIS action comes before the Court at General Term, on an appeal by the defendants, from a judgment granting the relief prayed by the complaint. The judgment appealed from is, "that the defendants be, and they hereby are, perpetually enjoined from using the premises mentioned in the complaint, or any part thereof, as a place of public entertainment on Sabbath days or evenings."

The complaint alleged, and it was proved on the trial, that the plaintiffs, on the 23d of February, 1855, were duly appointed receivers of the real estate of which Anson G. Phelps, then recently deceased, died seized and possessed, with power to rent or lease, in their names or otherwise, "the said houses, lands, and premises, any and every part thereof," from time to time, and for any term not exceeding five years.

By a lease, dated the 1st of May, 1855, they, as such receivers, leased the premises in question to William Curr, for five years from that date. The lease was signed and sealed, as well by Wm. Curr, as by the said lessors. Such lease contains a covenant by said Curr, "that he will not use or occupy, or permit the said premises, or any part thereof, to be used or occupied, for any business that may be a nuisance or noxious or dangerous to the neighborhood, and particularly that the same shall not be used or

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occupied as a grocery, or for selling liquor; and that he will not let or underlet the said premises, or any part thereof, nor assign this lease, or any portion of the term hereby demised, without the written consent of the parties of the first part, their successors or assigns, first obtained." Said lease also declares, that "it is expressly agreed, that should any default be made in the punctual payment of the said rent, or should the said party of the second part, (said Curr,) his heirs, executors, or administrators, violate or fail to perform any of the covenants or conditions hereinbefore contained on his part, then the said parties of the first part, their successors and assigns, may forthwith, without notice, and without resorting to any proceedings for recovery of possession, re-enter the said premises either by force or otherwise, and remove all persons therefrom, without being liable to any prosecution therefor."

It was also proved, that on the 21st of November, 1856, Curr assigned the said lease to the defendants, pursuant to a written consent at the foot thereof, in these words, viz:—

"Consent is hereby given to William Curr to assign the foregoing lease to James Lambert and David Gardner.

"Wm. E. Dodge,
"ANSON G. PHELPS, } Receivers.
"By T. ALLEN, their agent."

It was also proved, that cotemporaneous with the giving of such consent, and the assigning of said lease, an agreement in writing was executed, signed by Lambert & Gardner severally, and also signed "Wm. E. Dodge, Anson G. Phelps, by T. Allen, their agent," and in and by it, the said Lambert & Gardner "expressly covenant and agree, that the said premises shall not, nor shall any part thereof, be open to the public as a place of entertainment or refreshment on Sabbath days or evenings; nor shall said premises, or any part thereof, be used, at any time, as a drinking saloon or tippling place, so called, under penalty of forfeiture of the lease."

The defendants' answer admits, that the garden and premises have been opened on the Sabbath, as well as on other days, until the temporary injunction was served in this action, but de-

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nies "that said premises have been, or are kept or used by them as a drinking saloon or tippling place, either on Sabbath or week days, in any way or manner offensive to public decency or good morals, or so as to have become or to be either a public or private nuisance, or in any way injurious to the plaintiffs, or to the estate of which they claim to be the receivers, or to the good order, peace, or good government of the neighborhood."

When the plaintiffs rested, the defendants moved to dismiss the complaint, on the following grounds:—

First.—That it did not appear that T. Allen, who executed the said agreement between the plaintiffs and defendants, as the agent of the plaintiffs, was, in fact, such agent, or had been or was authorized as such agent, to enter into or execute said agreement.

Second.—That it had not been proved, nor did it in any way appear, that the plaintiffs, or the estate of Anson G. Phelps, deceased, had suffered, or would suffer any damage or injury whatever, by reason of the premises in question being used as a public place of entertainment or refreshment on Sabbath days, or by reason of the breach of any other covenant, complained of in the complaint, or admitted in the defendants' answer.

The Court refused to dismiss the complaint, and the defendants' counsel excepted.

The defendants then offered to prove—

First.—That Mrs. Phelps, the widow of Anson G. Phelps, deceased, was, and had been, since her husband's death, the owner in fee of the real estate leased to the said Curr, and described and referred to in the agreement executed by the defendants, and that the plaintiffs have not, and never had any beneficial interest or estate whatever in said real estate and premises.

The Judge refused to admit the said evidence, and the defendants' counsel excepted.

The defendants then offered to prove—

Second.—That since said premises had been opened and kept by the defendants as a public place of entertainment, or refreshment, good order and decorum had, at all times, as well on the Sabbath as other days, been kept and preserved there; and that no noisy, riotous, or disorderly acts or conduct had occurred, or had been permitted to occur or take place there, either on Sabbath

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or other days; and that the said premises had never been kept or used by the defendants as a drinking saloon or tippling place, either on Sabbath or other days, in any way or manner offensive to public decency or good morals, or so as to have been, or to be either a public or a private nuisance.

The Judge refused to admit the said evidence, and the defendants' counsel excepted.

The defendants then offered to prove—

Third.—That neither the plaintiffs, nor the estate of which they claimed to be the receivers, had been injured or deteriorated in value, by the violation, by the defendants, of any covenant or agreement, alleged in the complaint, or admitted by the answer.

The Judge refused to admit the said evidence, and the defendants' counsel excepted.

The defendants then offered to prove—

Fourth.—That the defendants, since their taking possession of the premises under their agreement with plaintiffs, had expended about \$5000 in grading, improving, repairing and ornamenting the grounds and buildings thereon, which would be a total loss, should they be perpetually restrained from keeping the premises open on Sabbath days, as a place of entertainment or refreshment, as the lease would thereby become valueless.

The Judge refused to admit the said evidence, and the defendants' counsel excepted.

The defendants then offered to prove—

Fifth.—That a short time before the execution of the agreement between the plaintiffs and the defendants, Mr. Allen, who executed the same as agent for the plaintiffs, told the defendants, that it would be necessary to insert a covenant in said agreement, that the premises should not be opened to the public on the Sabbath, as a place of entertainment, to satisfy the plaintiffs' religious scruples, and to get their consent to such agreement or lease to defendants, but that there should never be any complaint, and there was no intention to take advantage of the covenant, if the place was kept orderly, and no disorderly or improper conduct was permitted there; and that the defendants executed such agreement subsequently, relying on such statement of Allen.

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The Judge refused to admit the said evidence, and the defendants' counsel excepted.

The defendants then rested.

Mr. Justice Hoffman, before whom the action was tried, gave judgment in favor of the plaintiffs, as before stated, and from that judgment, the defendants appealed to the General Term.

A. R. Dyett, for the appellants.

I. The plaintiffs are receivers of the estate of Anson G. Phelps, and sue as such upon an agreement made by them in the same capacity. They ask a perpetual injunction to restrain the violation of a covenant. This is purely an equitable remedy. No damage to the plaintiffs nor to the estate they represent was proved, though it was alleged in the complaint. Nor would a damage to the other estate of A. G. Phelps give any right of action to the plaintiffs. Nor was it proved that there was any such "other estate" in existence. No irreparable damage was alleged or proved. No other damage than that alleged in the complaint can be presumed. The defendants on the trial offered to prove, not only that no damage was sustained, but that an actual benefit to the estate, and a great injury to the defendants were produced. The case then simply presents the question, whether a court of equity will, merely to gratify a whim or caprice of the plaintiffs, restrain by perpetual injunction the breach of a covenant, where it is confessed no damage to the plaintiffs could result from it, but a benefit be received by them, and the defendants be seriously injured. An injunction is a prerogative writ, not a writ of right. There is no such thing as an absolute right to an equitable remedy. Absolute rights may be enforced in courts of law, or by what are known as legal remedies; but equity will not aid in the enforcement of a right, unless it be attended by an equity; and that equity must be a wrong to the plaintiffs, consisting of the deprivation of a substantial right, which cannot be redressed or compensated by a legal remedy. (Willard's Equity, 274; Story's Eq. J. § 928; Id. § 864.) And that wrong must be attended by an injury; otherwise it is *injuria absque damno*, where damage has been suffered, but is irreparable by a court of law; there equity will lend its aid to complete

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the remedy. But where a court of law gives nominal damages, because no real damage has been sustained, there the maxim *equitas sequitur legem* applies. Strictly, at law, nominal damages might here be recovered, without proof of any. But that remedy would be adequate. *Eo nihilo fit nihil.* The plaintiffs have no equity, and should be left to their action for damages. (Willard's Equity, 261; and see Point V. *infra*; Story's Eq. J. § 959, *a. b.* and notes.)

II. The covenant in question was made by an agent of the plaintiffs, who were themselves but agents, and could not delegate their authority. There was, therefore, no consideration for the covenant on the part of the defendants, because it was void as to, and did not bind plaintiffs; nor had the plaintiffs, as receivers, any authority to make or exact such a covenant.

III. The only consideration for the covenant alleged in the complaint, was "to obtain the plaintiffs' consent to an assignment of the lease," by the tenant Curr. It was extorted from the defendants, and will not be favored in equity. (Willard's Equity, 261.)

IV. The covenant is unfair and unreasonable. The defendants not only extorted the covenant in question, but as a consideration of simply consenting to assign, they, in addition to this, in the same agreement, extorted a covenant to improve the premises to the extent of \$2000, and that those improvements should belong to them. And they were mere officers of the Court to lease the premises. (Willard's Equity, 262, 267, 268.)

V. The covenant should not be enforced by injunction, for the following additional reasons: 1. It is not mutually capable of specific performance. (Willard Eq. 267.) 2. It is objectionable in its nature and circumstances. (Id. 262; Story Eq. J. § 959, *a. b.* and notes.) 3. Although the Court might refuse to annul such a covenant, yet it would not enforce it. (Id. 263, 266.) 4. It is a hard and unconscionable contract, and is not fair and just in all its parts. (Id. 264, 266, 268.)

VI. The covenant in question provides that the penalty for its violation shall be a forfeiture of the lease. This is the only remedy the plaintiffs have, except their other legal one for damages. At all events, this is sufficient to prevent their having

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a specific performance and perpetual injunction, (*Vincent v. King*, 18 Howard, 284,) especially where no damage is pretended.

VII. The Judge on the trial, for the several reasons above stated, erred in refusing to dismiss the complaint, and in refusing to receive the evidence offered by defendants.

VIII. The judgment should be reversed, and the complaint dismissed, with costs.

A. Wakeman, for the respondents.

I. The defendants, having taken their title to the premises through Mr. Allen, as agent, are estopped from denying his authority to make the agreement under which they hold.

II. They are also estopped from denying the title of the plaintiffs, who are their landlords.

III. Evidence is inadmissible, to avoid a covenant by showing, that at the time of its execution, it was agreed by parol, that it should not be operative.

IV. It is not an answer to an action for the breach of a contract, that its performance would be a pecuniary disadvantage to the defendants.

V. The proprietor of premises may stipulate in a lease, that they shall not be occupied by the tenant for a purpose that is unlawful, or that is inconsistent with morality, or public propriety. And such a covenant will be enforced by a court of equity, although no pecuniary loss, and no actionable nuisance, is shown to have arisen from its violation. The consideration, that the breach of such a contract cannot be the subject of pecuniary estimation, renders the case peculiarly proper for equitable cognizance. (Story's Equity, §§ 925, 926, 927, 959; *Steward v. Winters*, 4 Sand. Ch. R. 587.) Even a covenant in reference to a matter of a mere taste, in the occupation of premises, will be enforced by injunction. (*Squire v. Campbell*, 1 Mylne & Craig, 459, 477 to 486; *Heriot's Hospital v. Gibson*, 2 Cow. 301; *Howard v. Ellis, et al.* 4 Sand. S. C. R. 369.)

BY THE COURT. BOSWORTH, J.—Assuming the consent, that Curr might assign the lease to the defendants, to be the same, in effect, as if it had been signed by the plaintiffs personally, and the

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agreement between them and the defendants to be as valid and effective as if the plaintiffs had executed it in person, instead of executing it by T. Allen, their agent, the only question would be, whether the defendants can be restrained by injunction from violating the covenant in question. *Steward v. Winters*, (4 Sand. Ch. R. 587;) *Howard v. Ellis*, (4 Sand. S. C. R. 369,) are authorities in support of the affirmative of that proposition.

The provisions of the statute law, which inhibit the transaction, on the Sabbath, of the business which the defendants covenanted not to prosecute on the premises on that day, and the considerations of public policy, which induced the enactment of such laws, should not disincline the Court to enforce, in behalf of the plaintiffs, such use of the demised premises as they exacted, when consenting to the transfer of the lease, and as the defendants, to obtain such transfer, then covenanted to make of them. (1 R. S. 675; Articles 8 and 9 of Part 1, chap. xx.)

The defendants have no right to use the premises at all, except by treating Allen as the actual agent of the plaintiffs, and one whom they were competent to appoint to do the acts, which he performed in their name and on their account. The plaintiffs were competent to do, personally, the acts which Allen performed as their agent, and the evidence of their ratification and adoption of his acts, furnished by their claiming the benefits of the contract, is sufficient to make the consent to the transfer of the lease and the agreement their own contracts, as between themselves and the defendants, who have entered into, and continued in the use and enjoyment of, the premises, by virtue of these transactions. (3 Kern. 593-594.)

The Court, therefore, properly refused to dismiss the complaint, on the grounds on which it was moved.

The first offer of evidence was properly excluded, because the defendants were not at liberty to show, in this action, that their landlord never had any interest in the demised premises. (*Jackson v. Davis*, 5 Cow. 123.) The fact that Mrs. Dodge may have owned the premises in fee, does not, necessarily, make the appointment of the plaintiffs, as receivers of such premises, void, nor affect the validity of any leases which they make, of any part of the premises to which their receivership extended.

The evidence proposed to be given under the second, third, and

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fourth offers, present no reasons why the defendants should not perform their contract, as they made it. (*Howard v. Ellis, et al., supra.*)

The fifth offer proposed to vary the effect of a written agreement, by proving less than a contemporaneous verbal contract, in conflict with it. It proposed to prove a statement of the agent, that his principals would not avail themselves of the benefit of a covenant which they exacted, provided the violation of it was orderly, and not accompanied by disorderly or improper conduct. This exception, like the others, is untenable, and the judgment must be affirmed.

Judgment affirmed.

JOSEPH ROCCO, Plaintiff and Respondent, v. JAMES H. HACKETT,
Defendant and Appellant.

1. In an action in this State, upon a judgment recovered in a sister State, if it appear that the Court by which it was rendered had jurisdiction of the subject matter, and of the person of the defendant, such judgment is conclusive.
2. The Courts of this State will not inquire into the merits of the plaintiff's claim, nor whether the judgment was recovered according to law, even though it be alleged that the most obvious dictates of justice were violated.
3. Where an action was brought on a judgment of the Superior Court of Suffolk County, Mass., which judgment was duly proved, and it appeared, that the defendant appeared, by his attorneys, in the action; and further, that such judgment was recovered on a prior judgment of the Court of Common Pleas:

Held, the defendant cannot defeat a recovery in this State, by proving that he never owed the plaintiff the debt; that he was never a resident, inhabitant or citizen of Massachusetts, but of New York; that he was never served with process in, or had any notice of the judgment in the Common Pleas, until sued thereon in the Superior Court; that, by the laws of Massachusetts, he was, in the said Superior Court, prevented from setting up any defence to the action; and that the judgment of the Common Pleas was, by the same laws, declared legal and valid.

Neither, nor all, of these facts can be received here as a defence.

(Before HOFFMAN, WOODBURY and PINKERFON, J. J.)

Heard Feb. 8d; decided March 18th, 1858.

THIS action is brought upon a judgment recovered in the Superior Court of the County of Suffolk, State of Massachusetts, on the 18th February, 1856, for \$293 $\frac{7}{100}$.

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The answer (so far as it is material to state its contents) avers that the judgment on which this action is brought, was recovered on a previous judgment, purporting to have been rendered in favor of this plaintiff against the defendant at a Court of Common Pleas held at Boston, in and for said County of Suffolk, on the 4th of April, 1848, for \$117 $\frac{1}{4}$, the record of which shows a declaration against the defendant, Hackett, and one Ford, as joint debtors; that the action was commenced at the previous July Term of the said Common Pleas, "when and where said Ford appeared, and a Deputy Sheriff of Suffolk returned, that he left a summons at the last usual place of abode of said Hackett, and thence the action was continued from term to term to the present (April) term, and now the plaintiff discontinues against Ford, on the ground of his insolvency, and said Hackett, though called to come into court, does not appear, but makes default. It is, therefore, considered by the Court that the said Rocco recover of the said Hackett the sum of \$117 $\frac{1}{4}$ damages, and \$56 $\frac{1}{4}$ costs of suit."

The answer in this present action proceeds to deny that there was any thing due to the plaintiff from this defendant alone, or with Thomas Ford; and avers that he never was a resident, inhabitant, or citizen of the State of Massachusetts. That before the commencement of that action, (in the Common Pleas,) and up to the said judgment, he was not within the jurisdiction of Massachusetts, but was before, and at the time mentioned, and ever since, a resident, inhabitant, and citizen of the City, County and State of New York; was never served with any writ, process, or summons in, or notice of the said action, and never appeared therein by attorney or otherwise, and had no notice thereof until the action was commenced thereon, which resulted in the judgment referred to in the complaint in this action. That in the action in the Superior Court, he was, by the laws of Massachusetts, prevented and precluded from setting up any defence to the action in which such judgment in the Common Pleas was rendered, and such judgment was declared to be legal and valid, and of the same force and effect as if the defendant had been personally served, or had appeared and defended the same, and he, the defendant, has never had an opportunity of being heard in or defending said action on the merits thereof.

That the said Court of Common Pleas never had any jurisdic-

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tion of this defendant, nor of the subject of the action, and the said Superior Court acquired no other or further jurisdiction, and both judgments are fraudulent and void.

The action was brought to trial on the 16th of June, 1857, before Chief-Judge Duer and a jury, and the plaintiff gave in evidence a record of a judgment of which the following is a copy:—

“ JUDGMENT.

“ *Commonwealth of Massachusetts, Suffolk, ss:*

“ To all persons to whom these presents shall come, Greeting: Know ye that among our records of our Superior Court of the County of Suffolk, it is thus contained:

“ *The Commonwealth of Massachusetts, Suffolk, ss:* “ To the Sheriffs of our several Counties, or their Deputies,

[Seal.]

Greeting:

“ We command you to attach the goods or estate of James H. Hackett, now commorant of Boston in the County of Suffolk, gentleman, to the value of five hundred dollars, and summon the said defendant, if he may be found in your precinct, to appear before our Justices of our Court of Common Pleas, to be holden at Boston within and for our County of Suffolk, on the first Tuesday of April next; then and there in our said Court to answer unto Joseph Rocco of Boston aforesaid, musician, in an action of contract; and the plaintiff says that he, said plaintiff, by the consideration of our Justices of our Court of Common Pleas, held within and for the County of Suffolk, on the fourth day of April, A. D., 1848, recovered judgment against the said defendant by the name of James H. Hackett, of Boston Theatre, Manager, for the sum of one hundred and seventeen $\frac{1}{10}$ dollars damages, and fifty-six $\frac{1}{10}$ dollars costs of same suit, as by the record thereof now remaining in said Court appears, which said judgment is in full force and not reversed, annulled or satisfied. And the defendant owes the plaintiff both said sums and interest thereon, amounting in all to two hundred and forty-three dollars and thirty-nine cents. To the damage of the plaintiff, as he says, the sum of five hundred dollars, which shall then and there be made to appear with other due damages. And whereas the said plaintiff says that the said defendant has not in his own hands and possession, goods and estate to the value of five hundred dollars

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aforesaid, which can come at to be attached, but has intrusted to and deposited in the hands and possession of Eben H. Wade, of Boston, in the County of Suffolk, gentleman, William F. Flemming of said Boston, Treasurer of the Boston Theatre, and the Webster Bank, in Boston, a corporation established by law, and Frank Flemming, Treasurer of the Boston Theatre, in said Boston, trustees of the said defendant's goods, effects, and credits to the said value, we command you, therefore, that you summon the said Eben H. Wade, and said Flemming, and said Webster Bank, and said Frank Flemming as aforesaid, if they may be found in your precinct, to appear before our Justices of our said Court to be holden as aforesaid, to show cause, if any they have, why execution, to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action, if any, should not issue against his said goods, effects or credits in the hands and possession of the said trustees, and have you there this writ with your doings therein.

"Witness, Edward Mellen, Esquire, at Boston, the twenty-ninth day of January, in the year of our Lord one thousand eight hundred and fifty-five.

"JOSEPH WILLARD, Clerk."

"Upon which writ is the following return by the officer who served the same.

"*Suffolk, ss:* January 29, 1855. By virtue hereof, I, this day at 7 o'clock, P. M., summoned the within named Eben H. Wade to appear and show cause at Court, by reading this writ in his presence and hearing; afterwards on the same day, I again summoned said Wade to appear and show cause at Court by leaving an attested copy of this writ at his last and usual place of abode. Also, on the same day, I summoned the within named William F. Flemming, Treasurer of the Boston Theatre, to appear, and show cause at Court by delivering to him in hand an attested copy of this writ, and on the thirtieth day of said January, I summoned the within named Webster Bank to appear and show cause at Court by delivering to Solomon Lincoln, Esq., cashier thereof, an attested copy of this writ. February 2, 1855, I summoned the within named Frank Flemming, Treasurer of the

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Boston Theatre, to appear and show cause at Court by delivering to him an attested copy of this writ. On the same day I attached a chip, as the property of the within named James H. Hackett, and summoned him to appear and answer at Court by delivering to him in hand an attested copy of this writ.

“Service and travel, \$1.70—copies and extra trouble, \$5.

‘E. W. SANBORN, Deputy Sheriff.

“At the said Court of Common Pleas, held at Boston, in and for said County, on the first Tuesday of April, A. D., 1855, the plaintiff appeared by Charles G. Thomas, Esq., his attorney, and entered the above action, and the defendant appeared by his attorneys, James A. Abbott and J. Kendall Tyler, Esq., and on the tenth day of April, during the April term, filed the following affidavit:—

“*Commonwealth of Massachusetts, Suffolk, ss:*

“Court of Common Pleas, April Term, 1855.

“Joseph Rocco, plaintiff,

v.

“James H. Hackett, defendant, and Trustees.

“I, James A. Abbott, on behalf of James H. Hackett, the defendant in the above action, on oath declare, that I verily believe that he has a substantial defence to the above named action on its merits, and intend to bring the same to trial.

“JAS. A. ABBOTT.

“Subscribed and sworn to this }
April 4, A. D., 1855, before me, }

“J. KENDALL TYLER, Justice of the Peace.

“And on the twentieth day of said April, during said term, said defendant filed the following answer:—

“*Commonwealth of Massachusetts, C. C. Pleas.*

“J. Rocco,

v.

“J. H. Hackett and Trustees.

“And the defendant comes and says, that, admitting that there is such a judgment as is set forth in the plaintiff’s writ and decla-

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ration, he says that such judgment ought never to have been rendered, because that no legal service was ever made upon him in the original suit upon which said judgment was rendered. And he further says, that he has instituted proceedings for a stay of said judgment in the Supreme Judicial Court for Suffolk County aforesaid, according to the form of the statute made and provided in such cases. ABBOTT & TYLER, attorneys for defendant.

"And on the twenty-second day of said June, during said Term, the plaintiff and defendant filed the following agreement:—

"No. 2285 Court of Common Pleas, April Term, 1855.

"Rocco v. Hackett and Trustees.

"It is agreed, that the above action may be continued for judgment *v.* defendant, to July Term, next first day.

"JAS. A. ABBOTT, attorney for defendant.

"C. G. THOMAS, attorney for plaintiff.

"June 14, 1855.

"And thereupon the defendant, though called, did not appear, but made default.

"And thence the action, having been continued to the October Term, was transferred by act of law to the last (November) Term of this Court.

"And thence the action was continued to the present January Term, 1856, and now, on the eighteenth day of February, during said January Term, the following is filed:—

"*Suffolk*, ss. Superior Court, January Term, 1856.

"Joseph Rocco *v.* James H. Hackett and Trustees.

"All the trustees in the above case may be discharged without costs.

"C. G. THOMAS, attorney for plaintiff.

"J. H. BUTLER, attorney for trustees.

"And thereupon it is ordered by the Court, that said trustees be discharged without costs. And it is considered by the Court, on the eighteenth day of February, A. D., 1856, that the said Rocco recover of the said Hackett the sum of two hundred, fifty-

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eight dollars seventy-nine cents damages, and thirty-five dollars costs by suit.

"All and singular which premises we have held good by the tenor of these presents to be exemplified.

"In testimony whereof, we have caused the seal of our Superior Court of the County of Suffolk, to be hereto affixed.

"Witness, Albert H. Nelson, Esquire, Chief Justice of [Seal.] our said Superior Court, at Boston, this fourteenth day of May, A. D., eighteen hundred and fifty-six.

"Attest. JOSEPH WILLARD, Clerk."
(Judge's Certificate.)

It was admitted that this record was properly authenticated to be read in evidence.

The plaintiff then rested his case.

The counsel for the defendant then produced, and offered in evidence, a record of a judgment of the Court of Common Pleas of Suffolk County, in the Commonwealth of Massachusetts, a copy of which is set out in the defendant's answer. The same being objected to by the plaintiff's counsel, the Court excluded it, to which ruling defendant's counsel excepted.

Defendant's counsel then offered to prove the following, and in support thereof, called the defendant to establish the same, due notice having been served on the plaintiff's attorney of such intended examination; but the Court, being of the opinion that said evidence would constitute no defence at law to said action, refused to allow the same, to which the defendant duly excepted:—

1. That there never was any sum whatever due, or owing, from the defendant, either alone or with one Ford, to the plaintiff.
2. That the defendant was never a resident, inhabitant, or citizen of Massachusetts, but of the State of New York.
3. That the defendant was never served with process in, nor ever had notice of, the judgment on which the judgment mentioned in the complaint was recovered, until suit on the latter was commenced.
4. That nothing is or was ever due from defendant to plaintiff.
5. That, by the laws of Massachusetts, he was, in said Superior Court, prevented from setting up any defence to the action in

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which said judgment, in the Court of Common Pleas, was recovered; and that, by the same laws, said judgment was declared to be legal and valid.

To which several offers the plaintiff's counsel objected, and the same were excluded by the Court, to which ruling defendant's counsel excepted.

The Court thereupon directed the jury to find a verdict for the plaintiff, for the full amount claimed; and the jury then and there rendered a verdict in favor of the plaintiff, against the defendant, for the sum of \$320.89: to all which the defendant's counsel excepted.

Judgment being entered for the plaintiff upon the verdict, the defendant appealed to the General Term.

C. Bainbridge Smith, for the defendant (appellant).

I. The defendant, a citizen of this State, had judgment pronounced against him in a suit commenced in Massachusetts, while he was in this State, without notice, and without an opportunity of being heard, or making a defence. 1. An action, by the laws of Massachusetts, may be commenced in any of the Courts of that State, against a non-resident defendant, by leaving the summons at his last and usual place of abode. (Mass. R. S. 1836, p. 552, §§ 44, 45; Mass. R. S. 1836, p. 566, §§ 3, 4.) 2. A judgment obtained by such service is valid; and, in an action upon such judgment, by the same laws, the want of personal service or notice, constitutes no defence, nor can the merits of the original action be inquired into. (*Hawes v. Hathaway*, 14 Mass. R. 233.) 3. On the other hand, a judgment recovered in another State against a citizen of Massachusetts, when sued there, if it appear he was not personally served with process within that State, is void, for want of jurisdiction. (*Hall v. Williams*, 6 Pick. R. 232; *Ewer v. Coffin*, 1 Cush. R. 28, 28.) 4. The Legislature of a State has no power to pass a law, by which the Courts of that State can pronounce a judgment against a citizen of another State, without his having an opportunity of being heard. (*Oakley v. Aspinwall*, 4 Comst. R. 518, 521, 522; *Ewer v. Coffin*, 1 Cush. R. pp. 28, 28.)

II. The judgments recovered in Massachusetts against the de-

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fendant were fraudulently obtained. The defendant, in his answer, sets up the facts specifically, and, on the trial, offered evidence in support of that defence, which was ruled out by the Court, and exceptions taken. (*Dobson v. Pearce*, 2 Kern. R. 156.)

III. Any fact, which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an interference by a court of equity. (*Dobson v. Pearce*, 2 Kern. 156, 165, and cases cited; 2 Story Eq. Jur. §§ 887, 894, 896.) 1. The claim on which the judgments in Massachusetts were obtained was unfounded. 2. The defendant, without any fault or negligence on his part, has been deprived of the opportunity of showing the claim against him was unfounded. 3. The answer sets up an equitable defence, and one which the defendant, in Massachusetts, could not avail himself of at law. 4. The Court below rejected the evidence offered on the part of the defendant, on the ground that it would constitute no defence at law. 5. The distinction between actions at law and suits in equity, the jurisdiction of the respective courts, and their form of proceeding, are preserved in Massachusetts. (Mass. R. S. p. 500.) 6. The equitable relief prayed for by the defendant—namely, to be allowed to prove the plaintiff's claim against him unfounded, and of which defence the defendant was at law deprived—if granted, would not be inconsistent with the full faith and credit to which judgments of other States are entitled. (*Dobson v. Pearce*, 2 Kern. R. 156; *Pearce v. Olney*, 20 Conn. R. 544, 556.)

Cornelius A. Runkle, for the plaintiff (respondent).

Among the respondent's points are the following:—

I. The defendant, having agreed that the plaintiff might take judgment against him, is now estopped from denying the validity of it. a. The stipulation of the attorney binds the party. (15 Wend. 380.)

II. The judgment upon which this action is brought is conclusive in Massachusetts, upon the merits; therefore it is conclusive here. (Art. 4th, § 1, Con. U. S.; Act of Congress I., U. S. Statutes at large, p. 122, ch. 37; *Miller v. Duryea*, 7 Cranch. 481;

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Hampton v. McConnel, 3 Wheat. 234.) a. The general rule both in this country and in England is, that a question settled, or which might have been settled in a suit in a court of competent jurisdiction between actual parties, after trial will not be opened. (2 Parsons on Contracts, 118; *Henderson v. Henderson*, 2 Q. B 288; *Bruen v. Hone*, 2 Barb. 586; *Baker v. Rand*, 13 Barb. 152, and cases cited; *Embry v. Conner*, 3 Com. 511; *Smith v. Lewis*, 8 John. 157; *Emery v. Greenough*, 3 Dallas, 369, 372.) b. It will be presumed that all the defences the losing party had were made and were insufficient. (2 Parsons on Con. 118.)

III. This court cannot go behind the judgment sued on. (See authorities cited under 2d point; *Bissell v. Briggs*, 9 Mass. 462; *Sergeant v. Bank of Indiana*, 4 McLean, 339; *Wern v. Pauling*, 5 Gill and John. 500; *Simpson v. Hart*, 1 John. Ch. 91; *Green v. Sarmiente*, 1 Peters, C. C. 74; *Rust v. Frothingham*, Breeze's R. 258; *Curtis v. Gibbs*, Pennington's R. 399; *Kimball v. Shultz*, Breeze's R. 128; *Field v. Gibbs*, 1 Peter's C. C. 155; *Noyes v. Butler*, 6 Barb. 613; *Aldrich v. Kinney*, 4 Conn. 380; *Starbuck v. Murray*, 5 Wend. 159; *Shumway v. Stillman*, 4 Cow. 296; Id. 6 Wend. 447.)

IV. The true rule is that a judgment recovered in another State is conclusive in an action brought on it in this State as to all facts recited in the record, except those which go to show the jurisdiction of the court rendering the judgment; to wit, service of process on defendant personally, or his appearance in the action personally or by his attorney. (*Noyes v. Butler*, 6 Barb. 613.) a. Where the record of the court of a sister State shows on its face that the court rendering the judgment had jurisdiction of the person of the defendant, and when such jurisdiction is not disproved, such record is, under the Constitution and laws of Congress, conclusive evidence of all and every other fact contained in it. It ranks as high as a domestic judgment and will be as conclusive as such a judgment upon the parties. (9 Mass. 468; 6 Pick. 241; 19 John. 162, and cases cited above.)

BY THE COURT. WOODRUFF, J.—The defendant was sued in one of the courts of Massachusetts; he was personally served with process; he appeared in the action; he interposed such defence as he was advised; judgment was rendered against him.

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Having jurisdiction of the subject matter, and having jurisdiction of his person by personal service of process, and by actual appearance, the judgment of that court is in the absence of impeachment for fraud conclusive upon us.

We are not at liberty to inquire upon what views of the law that court proceeded; or whether, if we had to pass upon the same questions, we should have rendered the same judgment.

We can no more say that that court erred in holding the previous judgment (obtained without actual service of process on the person of the defendant) valid and binding, and, therefore, we will disregard their adjudication upon that question, than in any case, where it appeared that a judgment was recovered on demurrer to a complaint we would hold the judgment open to inquiry, because we deemed the complaint insufficient in law to warrant a judgment.

Indeed, we hold the rule invariable, that where jurisdiction of the subject and of the person has been acquired and judgment rendered, in the court of a sister State without any fraud, we can neither inquire into the facts proved, nor the law applied to those facts, by which such courts were governed.

The judgment must be affirmed with costs.

**EDWARD C. RICHARDS, Plaintiff, v. ROBERT F. WESTCOTT, et al.,
Defendants.**

1. A city express company, engaged in carrying parcels between the City of New York and Brooklyn, and in carrying the trunks of travellers to and from the passenger dépôts of the various railroads, are common carriers, and perform their duties under the responsibilities of common carriers.
2. Where such a company is employed to carry a traveller's trunk to a passenger dépôt, and, by mistake, it is wrongly delivered; and, being recovered, it is forwarded to the traveller's destination, but is found to have been opened and a portion of its contents stolen: the company are not liable to a third person for a box of jewelry belonging to him, which the traveller had, as agent for such third person, packed in his trunk, and which he was intending to dispose of as merchandise.
3. A common carrier is entitled to protection against liability, sought to be thrown upon him, by concealment or fraud, which he would not otherwise have assumed; and no one has a right, by any concealment or artifice, to disarm him

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of that vigilance, which the nature and extent of the danger reasonably demands; or to deprive him of the increased compensation which a more hazardous or responsible service justly entitles him to receive.

He is not, therefore, when engaged in carrying a traveller's trunk, containing the traveller's wearing apparel and equipments, presented to him and paid for as ordinary travelling baggage, liable for the loss of a box of jewelry, put up for sale as merchandise, and packed in such trunk.

4. Where a complaint charged the defendants, as common carriers generally, without describing their route, proof that their route was confined to New York and Brooklyn creates no variance. Under an averment, that they undertook to carry from Brooklyn to Buffalo, if it be proved that they undertook to carry to New York, and, having delivered the goods at the wrong place, they undertook to recover and deliver them at Buffalo, the variance is not fatal.
5. Where the plaintiff avers a delivery of goods to the carrier by himself, and a promise to himself to carry, and it appears that the agent of the plaintiff delivered the goods, and the promise was made to him, there is no variance.
6. In declaring against a common carrier, for loss of goods, it is enough that the plaintiff avers the delivery of the goods, and the defendants undertaking or duty, and its neglect or breach, without an averment that the plaintiff was himself without fault.

(Before Bosworth, Woodmuss and Pierson, J. J.)

Heard, Feb. 8th; decided, March 18th, 1858.

THIS action comes before the General Term upon a general verdict for the plaintiff, taken, as the case states, "subject to the opinion of the Court;" accompanied by the answers of the jury to specific questions submitted to them.

The action was tried on the 11th day of February, 1857, before Mr. Justice Slossen and a jury.

No question arose on the pleadings, except the question of variance.

The complaint was as follows:—"The complaint of the plaintiff respectfully shows, that the defendants, on the 7th day of November, A.D. 1855, were common carriers of goods and chattels, for hire; that, as he is informed and believes, on or about the said day, the said plaintiff caused to be delivered to the said defendants, at the City of Brooklyn, in the State of New York, as such carriers, one trunk, containing, among other things, one box of jewelry, to be safely and securely carried and conveyed, by the said defendants, from the City of Brooklyn to the City of Buffalo, in the State of New York, and there securely to be delivered to the plaintiff, for a certain reasonable reward to the defendants in that behalf; and plaintiff further says, that the said box of jewelry was the property of him the said plaintiff, and was

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of the value of \$353.43. And the plaintiff furthers says, that, as he is informed and believes, the defendants then and there accepted and received the said trunk and box of jewelry aforesaid, and promised safely and securely to convey and deliver the same. Yet the said defendants, not regarding their duty as common carriers, did not safely or securely carry said trunk and box of jewelry from Brooklyn to Buffalo, or deliver the same securely to the plaintiff; but so negligently conducted themselves in that behalf, that said trunk, as the plaintiff is informed and believes, was broken open and robbed, and said box of jewelry taken therefrom, and not delivered to the plaintiff; and said box, of the value aforesaid, is wholly lost to the plaintiff; and the plaintiff says, that by reason of the premises, he has sustained damage to the amount of \$450, for which amount he demands judgment against defendants, together with costs."

The defendants answered the complaint by appropriate denials of liability, etc., but admitted that they were common carriers of goods and chattels.

The plaintiff's proofs were mainly derived from the testimony of Wm. P. Davis, who detailed the circumstances upon which the defendants' alleged liability arose, as follows:

"In the fall or winter of 1835—November or December—I went to defendants' office, in Brooklyn, and left instructions for them to send to my house, in Brooklyn, and take my trunk to the dépôt of the New York and Erie Railroad, in New York City, at foot of Duane street, and, at the same time, a box that was in Court street, Brooklyn—box to go to freight-dépôt, same place—trunk to go to passenger-dépôt. The trunk was to go with me to Buffalo, by the New York and Erie Railroad, and the box was directed for Janesville, Wisconsin, by the same road. The trunk contained my wearing apparel and a box of jewelry belonging to the plaintiff. It was in my hands for the purpose of selling. Each article of the jewelry was numbered. The numbers were contained in an invoice made by me.—(A copy of the invoice was produced by the witness.)—These are the numbers: No. 395, 10 brooches; No. 463, 3 rings; No. 486, 6 rings; No. 496, 5 gold lockets; No. 502, 3 gold lockets; No. 503, 3 gold lockets; No. 504, 2 gold lockets; No. 510, 8 gold lockets; No. 520, 6 gold lockets; No. 525, 25 prs. ear-rings; No. 571, 12 prs.

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ear-rings; No. 605, 4 watch-keys; No. 786, 4 bracelets; No. 857, 3 finger-rings; No. 888, 23 $\frac{1}{2}$ pwt. 21 gold rings; No. 896, 6 prs. sleeve-buttons; No. 900, 15 prs. sleeve-buttons; No. 934, 2 lockets; No. 935, 1 locket; No. 960, 15 prs. sleeve-buttons; No. 962, 10 prs. ear-rings; No. 968, 25 prs. ear-rings. Was purchased at auction, of James Manchester. I went over to dépôt about 4 $\frac{1}{2}$ P. M. Did not find my trunk there. Remained there till after the boat left. Trunk had not then come. I saw it taken from my house before I went over. I helped put the box in Court street, the trunk being then in defendants' wagon. I returned to defendants' office that evening, and informed them that my trunk had not been left at the dépôt; they said it had surely gone. I said I had waited until after 5 P. M., and on inquiry at the office of dépôt, was assured no such trunk had been left there. I went over to the dépôt next morning, and made further inquiry. No such trunk had been left there. I went to defendants' office again, and the man there said they could not tell, that day, what had become of it, but were endeavoring to find it. I told him I wanted to go immediately to Buffalo. In the afternoon he told me they had found it; that boy, through mistake, had put it on North River boat; that boy was a green hand, and they discharged him. I told them there was something valuable in the trunk, and that I wanted to know about it, as I wanted to leave immediately for Buffalo. He told me to go to the defendants' office in New York, and see them. I went, but did not find them. I then went back to Brooklyn office; the same man told me if I would go on they would get the trunk and deliver it to me at United States' Hotel, in Buffalo, without any expense to me. I went to Buffalo that evening, and put up at United States' Hotel; remained there, perhaps, four days, and while there my trunk came there. I examined it, and found it had been broken open, and the box of jewelry taken out. I did not notice that any thing else was gone. The jewelry was purchased by me for Mr. Richards, at auction, at an assignee's sale, I having authority from him for the purchase."

On his cross-examination he said:—"I have stated all that was said between me and the man in office, at time I called and left the order."

"Several other witnesses were sworn, and examined on the

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part of the plaintiff, among whom was a Mr. James Manchester, who testified that he had been in the jewelry business about eleven years, and knew the jewelry in question; that he sold it to plaintiff, as assignee of Thomas Manchester, and that the sale was made at auction, by Mr. Leeds as auctioneer; that the same cost, originally, to manufacture, \$46.32; that its market value, in fall of 1855, in this city or in Buffalo, was an advance of 25 per cent. on its cost.

"Plaintiff's counsel next read parts of depositions taken under a commission issued in this case, in reference to the condition of trunk when it came to the City of Buffalo."

The defendants moved for a non-suit upon grounds substantially the same as the points urged by their counsel, upon the argument, hereinafter stated.

The defendants then gave evidence, tending to show that the defendants were a company, engaged in the business of carrying goods and trunks between New York and Brooklyn exclusively, under the name of "Westcott & Co.'s New York City and Brooklyn Express."

That the uniform custom of express companies is, to charge for carrying money and jewelry according to their value. That the defendants charge for carrying a traveller's trunk, is two shillings. That they never take jewelry and valuables unless they can get a receipt for it at the place of delivery by them; that trunks, to be delivered at the dépôts, they leave without taking receipts; that they cannot get receipts for them at the dépôts; that they should not have taken this jewelry if they had known it was in the trunk, as they could not get receipts for trunks at the dépôts; that the charge for carrying the jewelry, if they had known what it was, and had undertaken to carry and deliver it, would have been seventy-five cents; that Davis paid two shillings for carrying the trunk to the passenger-dépôt, and four shillings for carrying the box (which he said contained pictures,) to the freight dépôt; that the defendants had, on other occasions, taken packages for Davis. And Davis, being recalled by the plaintiff, testified that the defendants had carried his trunk for a year, and he had never been asked any questions respecting its contents.

The defendants gave evidence, also, of the usage of express companies, in charging a higher price for carrying jewelry and

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valuables, than for a traveller's trunk, and also of some other facts; but it is believed, that the special finding of the jury, and the further facts stated in the opinion of the Court, are all that are material to the full understanding of the points decided by the Court. Except, that the evidence was, that the trunk was not opened while in the actual charge of the defendants' servants, who were examined; and that it was put by them, by mistake, on the steamboat *Isaac Newton*, and carried to Albany. They sent for it to come back, and it was afterwards sent by the defendants to Buffalo.

The proofs being closed, the following questions were written down at the request of the respective counsel, and submitted by the Court to the jury.

The answers of the jury thereto appear after each question respectively.

1st. Was the trunk in question delivered to the defendants by Mr. Davis, to be transported from Brooklyn to the New York and Erie Railroad dépôt in New York City?

A. Yes.

2d. Did it at that time contain the jewelry in question?

A. Yes.

3d. Was the trunk and jewelry delivered at the dépôt in New York?

A. No.

4th. What was the value of the said jewelry?

A. \$482.90.

5th. Did Davis pre-pay for its transportation?

A. Yes.

6th. Were the contents of the trunk asked for by the defendants, or made known to them by Davis, at the time of its delivery to them for its transportation?

A. No.

7th. Is it the custom of the city express companies in general, or of the defendants' company in particular, to charge for the transportation of articles according to their value?

A. It is, when articles are known to be of extra value.

8th. Was the usage or rule, in the above particular, (if the jury shall find such to have been proved,) communicated to Davis be-

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fore the defendants undertook the transportation of said trunk, or was such usage known to him?

A. It was not communicated to Davis, and we have no proof that he knew it of his own knowledge.

9th. Was the trunk in question a traveller's trunk, in the common meaning of that word?

A. It was.

10th. Was this trunk to be delivered at the passenger dépôt, or at the freight dépôt, at the City of New York?

A. Passenger dépôt.

11th. If you say that the trunk was not delivered at the dépôt in New York City, what became of it?

A. By mistake, it was delivered to the People's Line Steamer, *Isaac Newton*.

12th. If, in answer to the last question, you say it was delivered by mistake at the wrong place, and afterwards sent by the defendants to Buffalo, state whether that was done by the defendants voluntarily, and without any further pecuniary compensation or consideration?

A. It was.

13th. Upon the arrival of the trunk in Buffalo, what were its contents, and was the jewelry in the trunk?

A. The trunk was broken open and the jewelry missing.

14th. If you say, in answer to the last question, that the jewelry was not in the trunk on its arrival at Buffalo, was it lost or abstracted before or after its delivery at the wrong place in the City of New York, (such place being the steamboat *Isaac Newton*, belonging to the People's Line,) or was it lost or abstracted before the agreement of the defendants to deliver the same in Buffalo?

A. After its delivery at the wrong place; but we have no evidence or means of knowing, whether lost or abstracted before or after the agreement to deliver the same in Buffalo.

15th. What was the customary charge for the transportation of a traveller's trunk from Brooklyn to New York?

A. Twenty-five cents.

16th. If you say Davis pre-paid for the transportation of the trunk, did he so pay as a distinct item, or was the charge for

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the trunk and box of pictures lumped together, and paid for as one item?

A. As two distinct items.

17th. Who was the owner of the jewelry in the trunk?

A. Mr. Richards, the plaintiff.

18th. Was the jewelry intended for merchandise, or did it constitute a part of a traveller's equipments or baggage?

A. It was merchandise.

19th. Did the defendants know that Davis had, on former occasions, carried jewelry in his trunk?

A. No.

The jury, under the direction of the Court, found a verdict for the plaintiff, and assessed his damages at \$432.90; and the Court ordered the verdict to be taken, subject to the opinion of the Court at General Term, and to be heard there, in the first instance, on the questions of law reserved at the trial, or arising under the special findings; judgment, in the mean time, to be suspended.

Chauncey Shaffer, for the plaintiff.

The "questions of law reserved at the trial, or arising under the special findings," are, first, on the motion for nonsuit on five points presented.

On the first point, the law is, "When there is no notice, the party who sends the goods is not bound to disclose their value unless asked." "If he makes no inquiry, and no artifice is made use of to mislead him, then he is responsible for loss, however great the value." (Story on Bailment, section 567, 5th edition; with references. 2d Kent, page 602, 6th edition.)

This action being in tort, variance between complaint and proof is not fatal. (18 Barbour, 500; 19 Wendell, 541.)

Proof shows there was neither "inquiry or artifice to mislead;" or notice to the plaintiff or his agent.

Defendant could not limit his liability by notice. (1 Kern. 485.)

The second point is covered by the law applicable to the first.

To the third point—to make a failure of consideration, and no contract to carry jewelry. There was a contract to carry trunk; and there being no proof of "artifice" or fraud, he was not bound to disclose contents, as seen by law to first point.

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To the fourth point—"Contract proved different from that in complaint." This being in tort, variance is not fatal. (18 Barb. 500; 19 Wend. 541.) Proof does not vary from complaint. "Subsequent agreement not supported by consideration." This is untrue in point of fact. The original consideration supports the extended contract. "Any damage or suspension, or forbearance of a right, is sufficient to sustain a promise." (2 Kent, 6th ed., page 465.) And Davis proves the extended contract in view of "damage," "suspension," and "forbearance."

But if there was no consideration, he is nevertheless, liable, having voluntarily undertaken to extend the contract as by same testimony. (Story on Bailments, 5th edition, §§ 170, 171 b; 2 Kent, pages 568-9, 6th edition. See, also, Parsons on Contracts, 2d edition, 671 and 672, 687 note; 13 Barbour, 361; 10 Id. 612).

A person who agrees to convey goods from one point to another, whether interested in the means of transportation or not, is a common carrier. (19 Wend. 329; 25 Wend. 661; 14 Barb. 524; 19 Id. 349; Parsons on Contracts, 650, 653, 657).

As to the fifth point, the proof shows Davis to have been plaintiff's agent.

If the motion on the nonsuit was properly denied, then the law on the facts, as found in the verdict, is for the plaintiff. (Interrogatories the 13th, 16th, 17th.)

On the 9th, 10th, and 18th findings, proof shows defendants carriers of goods, and not of passengers; and they are liable accordingly. (Parsons on Contracts, 2d edition, 675.)

On the 8th finding, proof also shows they are not in the habit of asking contents.

On the seventh, proof shows they did not ask contents, as before stated. That they were not in the habit of doing so, and no deceit was used. And they cannot limit their liability by usage or custom. (1 Kernan, 485.)

H. D. Sedgwick, for the defendants.

I. The nonsuit should have been granted, and the complaint dismissed. (*Oakley v. Morton*, 1 Kern. 28-33; *Brazill v. Isham*, 2 Kern. 9-17; *City of Buffalo v. Holloway*, 8 Seld. 496; *Thurman*

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v. Stevens, 2 Duer, 609; *Garvey v. Fowler*, 4 Sandf. 666; *Lienan v. Lincoln*, 2 Duer, 670; *Lawrence v. Wright*, 2 Duer, 673; *Mann v. Morewood*, 5 Sandf. 557; *Bristol v. Rensselaer and Saratoga Railroad Co.*, 9 Barb. 158; 1 Chitty Pl. 417, 418; Code, §§ 142, 148, 275; *Noxon v. Bentley*, 7 How. 316.) 1. The complaint does not aver that the bailor was free from fault, and the proof shows that his fault occasioned the loss. 2. The contract proved, is entirely different from that alleged. a. The complaint charges that the defendants are common carriers, without specifying their route or the class of their business. The loss was proved to have occurred beyond the limits of their route, and the risk was not proved to have been one within the line of their business. The complaint avers a contract by the defendants as common carriers, to take a trunk to Buffalo. The proof shows a contract to take it to the railway station in this city. (2 Greenl. § 290; *Tucker v. Cracklin*, 2 Stark. 385; Steph. N. P. 992; *Fowles v. Great Western Co.*, 16 L. & E. 531; Edw. on Bailments, 552, 554, 555, 559.) b. Even if the subsequent agreement to forward the trunk to Buffalo, made by the defendants without consideration, could establish a liability against them, such liability could not be proved in this action. But under this agreement they were not liable. No negligence was shown, and the loss occurred by robbery, for which neither mandataries nor private carriers for hire are responsible. (Angell on Carriers, § 60, and cases cited; Story on Bailments, §§ 213, 457, 339, 410, 413, 515; Edw. on Bailments, 105, 448, 449, 567, 568, 569, 288, 554, 133; *Brind v. Dale*, 8 Car. & Payne, 207; 1 Parsons on Con. 633, 606, 620; *Beardslee v. Richardson*, 11 Wend. 26; *Schmidt v. Blood*, 9 Wend. 268; *Foote v. Storrs*, 2 Barb. 326; *Ackley v. Kellogg*, 8 Cow. 223; *Latham v. Rutley*, 2 B. & C. 20; *Whalley v. Wray*, 3 Esp. 74; *Kimball v. Rutland Bk.* 26 Vermont, 247, 258, 259; *Hersfield v. Adams*, 19 Barb. 577.)

II. The negligence and fault of the bailor contributed directly to the loss, and bar a recovery in this action. (Edw. on Bailments, 452, 471; *Tonawanda Railroad Co. v. Munger*, 5 Denio, 255, Aff'd; 4 Comst. 349; *Armisted v. White*, 6 Eng. Law & Eq. 349; *Burgess v. Clements*, 4 M. & S. 306; *Miles v. Cattle*, 6 Bing. 743.)

III. As common carriers, the defendants are not liable. The

common carrier, it is settled, has the right to limit and define his liability. 1 By confining his business to an established route. 2 In respect to the nature of the goods he receives for transportation. He has the right to say what kind of goods he will take, having reference to their value and bulk, and within reasonable limits, whether, and under what circumstances he will take any goods. 3. In respect to the amount of his reward; he has the right, within proper limits, to apportion the reward to the risk. (*Sewall v. Allen*, 6 Wend. 835; 1 Parsons on Con. 649, 650, 711, 2d. ed.; *Jer. on Car.* 56; *Dorr v. N. J. Steam Nav. Co.*, 4 Sandf. 186; *Stoddard v. Long Island R. R. Co.*, 5 Sandf. 180; *New Jersey Steam Nav. Co. v. Merch. Bk.*, 6 How. 344, 416, 417, 418; *Moore v. Evans*, 14 Barb. 524; *Parsons v. Monteith*, 18 Barb. 353; *Edwards v. Sherratt*, 1 East. 604; Edwards on Bailments, 443.) 4 The rights which the law gives, it will protect and enforce. The carrier thus having the right to refuse particular liabilities, will be given the reasonable means and opportunity to exercise it. He is therefore entitled, before assuming a risk in relation to goods, to know their nature and value. (1 Parsons on Con. 654, 2d ed.; *Great North. Railway Co. v. Shepherd*, 14 Eng. Law & Eq. 367.) 5. Whether or not it be the duty of the carrier in general, to inquire as to the nature and value of the goods delivered to him, such duty certainly does not exist where, by reason of fraud, or other circumstances, such as the appearance of the goods, he is reasonably deceived as to their nature and value. (Edwards on Bailments, 472; vide cases cited *supra* and *infra*.)

IV. No contract was entered into, nor liability assumed by the defendants, in reference to which, any breach or loss has been shown. There was no acceptance of the jewelry. There was no default in relation to it by the carrier. The defendants' engagement and liability were in respect to a traveller's trunk only, not jewelry or merchandise. (Story on Bailments, § 533, 2; *Jer. on Car.* 60; *Angell on Car.* §§ 140, 141, 322; *Blanchard v. Isaacs*, 3 Barb. 388; *Theobald's Ap. to Jones on B.*, 4th ed. p. 15; *Tower v. Schenectady Railroad Company*, 7 Hill, 47; *Packard v. Getman*, 6 Cow. 757; 2 Bl. Com. 451; *Cohen v. Frost*, 2 Duer, 385, 341.)

V. By the settled law of this State, no recovery can be had in this action. 1. The liability of a common carrier once fixed, is,

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in respect to the subject-matter of the contract, always the same. The liability of a passenger-carrier in respect to the luggage of such passenger, is that of a common carrier. (*Angell on Carriers*, § 107; *Hollister v. Nowlen*, 19 Wend. 284.) 2. But the carriers of passengers' luggage, although thus common carriers in respect of it, are not liable for any jewelry or merchandise it may contain. (*Orange Co. Bank v. Brown*, 9 Wend. 85; *Pardee v. Drew*, 25 Wend. 459; *Hawkins v. Hoffman*, 6 Hill, 586; *Grant v. Newton*, 1 Smith, C. P. 95; *Blanchard v. Isaacs*, 3 Bar. 388; 2 Parsons, 720, 2d ed.)

VI. The contract, if it existed, was avoided by the fraud of the bailor. 1. The reasonable and general usage proved of paying an extra freight for valuable articles, and limiting the carrier's responsibility in respect to them, formed part of the contract. (2 Pars. on Con. 57; *Story on Bailments*, § 14; *Baxter v. Leland*, 1 Blatch. C. C. R. 526; *Van Santvoord v. St. John*, 6 Hill, 157; *Farmers' and Mechanics' Bk. v. Champlain Transp. Co.* 18 Verm. 181; *Edw. on Bailments*, 287.) 2. Independently of usage, on general principles, his concealment of the contents of the trunk evinced bad faith. His conduct was fraudulent, and avoided the contract which it induced. (1 Parsons, 719, 720, 2d ed.; 2 Pars. 275, 2d ed.; 2 Kent, 603, 604; *Gibbon v. Paynton*, 4 Burr. 2298; *Jer. on Car.* 34, 35, 40, 55; *Tyly v. Morrill*, Carthew, 485; *Batson v. Donovan*, 4 Barn. & Ald. 21; cases cited under 2d sub. of Point V.)

VII. The defendants are entitled to judgment.

BY THE COURT. WOODRUFF, J.—The objection that the variance between the allegations and the proof precludes a recovery, was properly overruled. The complaint states that the defendants are common carriers generally, without specifying any particular route, or between what places they are pursuing their business; and then avers that the plaintiff caused the trunk containing the property in question to be delivered to them at Brooklyn, to be conveyed by them from Brooklyn to Buffalo, and that they accepted it, and promised to convey and deliver the same: but not regarding their duty as common carriers, they so negligently conducted themselves that the trunk was broken open, and rob-

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bed, and the property in question, was taken therefrom, and not delivered, but was wholly lost to the plaintiff, etc.

The proof showed that the trunk was delivered to the defendants at Brooklyn, to be carried to the passenger depot of the New York and Erie Railroad Company, to go with the agent of the plaintiff by that railroad to Buffalo. And that by reason of the failure of the defendants to deliver the trunk at that depot, (it having been put on board a North River steamboat by the defendant's agent,) the defendants undertook to regain the possession, and then, without further charge or expense, to deliver it to the plaintiff's agent, at a hotel in Buffalo.

This was undoubtedly a variance; but a variance only in some particulars. By the provisions of the Code, "No variance between the pleading and the proof shall be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defence upon the merits. And whenever it shall be alleged that a party has been so misled, that fact shall be proved to the satisfaction of the Court, and in what respect he has been so misled." (§ 169.)

No such proof was offered, nor indeed was it claimed on the trial that the defendants were misled. We do not perceive that such a claim could be made with any plausibility. The successive undertakings of the defendants were, in effect here described with single reference to a final result, to carry from Brooklyn and deliver at Buffalo. The defendants were fully apprized of the claim of the plaintiff, and of the substantial fact upon which it rested, and of the ground upon which they were sought to be charged.

Nor is it material in this case that the complaint avers, and the answer admits, that the defendants are common carriers, without specifying the termini of their route. The proof showed that they are at least common carriers between Brooklyn and the respective railroad depots in New York, and it is proved that they received the trunk to carry on the route of their accustomed business, and the proof does not show that they have performed the duty thereby cast upon them. It is not shown that the loss of the property occurred on any other route. No proof given on the trial shows that the trunk was opened between New York and Buffalo. Having received the trunk, the liability of the defendants, as

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common carriers, continued until they had performed the duty which, as such carriers, they did assume. The trunk having never been afterwards produced, and safely and securely carried and delivered, the defendants, before they can claim exoneration, on the ground that they were not common carriers between New York and Buffalo, must, at least, show that, when, after their mistaken and negligent delivery on board the steamboat, they regained its possession, it was safe; not then broken and rifled.

It is, therefore, unnecessary for us here to say whether, had they shown that it was thus safe when they began to carry it to Buffalo in pursuance of their second undertaking, they would have been any the less liable.

We, nevertheless, are of opinion that the previous negligence and temporary loss of the trunk, and the trust devolved upon them by the plaintiff's agent at their instance, and his leaving for Buffalo in reliance upon their assurance, constituted ample consideration for their undertaking to "get the trunk," and to convey and deliver it at Buffalo. And, moreover, that, whether in the performance of this undertaking, they be regarded as common carriers, or merely as private carriers for hire, proof that the trunk was broken open and robbed of the property in question before its delivery, was sufficient to cast upon them the burden of proving that this happened without fault or negligence on their part. No such proof was offered.

Nor was it necessary for the plaintiff to aver in his complaint that the trunk was lost without his fault. It was enough that the plaintiff stated the delivery to the defendants, and that the loss occurred through their negligence, and so are the precedents. If the plaintiff's own negligence caused or contributed to the loss, that was matter of defence.

The mere fact, that the delivery of the trunk to the defendants was by Davis, the plaintiff's agent, and that the undertaking was in form made to him, does not of itself create any obstacle to the plaintiff's recovery, if, under the circumstances, the defendants would have been liable to Davis himself, had he been the owner of the property lost. This subject was considered in *Needles v. Howard*, (1 E. D. Smith, 57,) and *Grant v. Newton*, (Ib. 97,) and in the cases there referred to.

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But a more serious question remains to be considered. Davis, the plaintiff's agent, was a traveller. He was about leaving Brooklyn for Buffalo, intending to leave New York by the New York & Erie Railroad. He employed the defendants to take a box to the freight depot, and to take the trunk to the passenger depot, to go with him to Buffalo by the railroad. The trunk was a traveller's trunk, within the ordinary meaning of that word. The trunk contained Davis's wearing apparel, and also a box of jewelry belonging to the plaintiff, which latter box is the property for the loss of which the action is brought. The defendants are an express company, employed in carrying and delivering goods and baggage in the Cities of New York and Brooklyn. Although the finding of the jury is not in those precise words, yet, when examined in connection with the proofs, it may be reasonably taken to import that it is the uniform usage of city express companies to charge for the transportation of articles with reference to their value, though this was not communicated by the defendants to Davis, nor was it proved that he had actual knowledge of it. The jewelry constituted no part of a traveller's equipments or baggage, but was merchandise. The defendants had no knowledge that the trunk contained jewelry, nor that Davis had jewelry in his trunk on former occasions when they had carried his trunk for him.

The proof was uncontradicted, that the defendants would have charged a higher price for the carriage, had they been aware that the trunk contained jewelry; and, what is, perhaps, even more important, it shows that their course of business and uniform practice was, to adopt special precautions for their own protection, when they knew that they were carrying articles of especial value, such as jewelry, &c. And, to this end, they require a receipt therefor on delivery at the place of destination, and do not carry such articles except under circumstances in which this is practicable. While as to travellers' trunks to be delivered at railroad depots, although they cannot get receipts for them, they deem this extraordinary precaution not important. Indeed, there is evidence that, in view of the impracticability of obtaining receipts at the passenger depot, the defendants would not have carried the trunk, had they been apprised that it contained jewelry.

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It is not denied, nor, we believe, doubted, that, under these circumstances, the defendants became liable for the safe carriage and delivery of the trunk, as an ordinary traveller's trunk, and for its contents, to the extent that they consisted of the traveller's clothing, and such articles as are usually or properly comprised in the term baggage. But it is claimed by the defendants that that is the limit of their liability, and that, as here, the trunk, and all of its contents which belonged to Davis, was delivered, they have done all that they undertook to do, and all which it became their duty to do. That, not having been informed that the trunk contained jewelry or merchandise of any description, they have never undertaken to carry jewelry or merchandise, and the law cast upon them no duty to see to its safety or delivery: or, at all events, having used all the care and diligence necessary to secure, and having in fact secured the safe delivery of the traveller's trunk, with all that properly constituted baggage contained therein, they have fully discharged their duty. That they cannot be ignorantly or involuntarily brought under responsibility for valuable merchandise delivered to them under the guise of a traveller's baggage.

That carriers of passengers are not liable for the loss of money or merchandize contained in the travelling-trunks of such passengers, delivered to them as ordinary baggage, is well settled; and yet, in respect to such baggage, they are regarded as common carriers, and subject to the responsibilities of carriers of goods, even to the extent of insuring the safe carriage and delivery. (*Orange County Bank v. Brown*, 9 Wend. 85, 118; *Pardoe v. Drew*, 25 Wend. 460; *Hawkins v. Hoffman*, 6 Hill, 588; *Grant v. New-ton*, 1 E. D. Smith, 98, and cases cited; *The Great Northern Railway Co. v. Shepherd*, 14 Eng. L. and Eq. 367.)

And again, if the owner be guilty of any fraud or imposition, as, by concealing the value or nature of the goods and either does or says any thing which tends to mislead the carrier in respect thereto, put him off his guard by creating the impression that the goods are of less value than in truth they are, or otherwise preventing him from exercising proper precautions, in view of the importance of the hazard, the carrier will not be responsible.

The cases above cited, from our own reports, in relation to carriers of passengers, proceed upon these grounds; and Mr.

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Angel, in commenting thereon, says of the first named, that it "Is in accordance with the incontrovertible principle, that no person has a right, by practising concealment or fraud, to impose a duty upon another which he would not, if acting advisedly, have undertaken;" (it may be added) nor to disarm him of that vigilance which the nature and extent of the danger reasonably demands, or deprive him of the increased compensation justly due for the more arduous and responsible service.

These principles are plainly applicable to all carriers of goods, and are only just, as a protection, while the law is strict, if not harsh, in holding them to rigid accountability, when the duty to carry safely is fairly devolved upon them.

Whether the principle of those discussions is applicable to carriers who are employed to carry and deliver the travelling-trunk of a traveller, though not carriers of passengers themselves, is the immediate question before us.

It is, no doubt, true, as a general rule, in relation to the employment of carriers of goods, that the employer is not bound to disclose the contents of packages delivered for carriage, unless inquiry is made by the carrier. The rule is, in substance, so stated in Story on Bailments, § 567; in Kent, 3d vol. p. 608; and in Angel on Carriers, § 264; and numerous cases are cited in each in support of this rule.

And it is equally true, that the carrier, if he does inquire, has a right to a true answer, so that he may fully understand the extent of responsibility which he incurs by accepting the goods, may charge for the carriage a sum proportioned to the risk, and may adopt precautions, to secure the safety of the goods, which correspond with the magnitude of the hazard. (See same authorities above referred to.) And if the employer deceives the carrier, as to such contents, he will not be entitled to hold him in case of accidental loss, to any greater liability than would rest upon him if the goods were in truth as represented. (*Tyly v. Morrill*, Carth. 485.) And it may be doubtful, whether, in such case, the carrier is liable at all.

It was said, in *Riley v. Horne*, (5 Bing. 217,) that if the carrier, without inquiry, does take charge of the goods, he waives his right to know their contents and value. But this must be understood with the qualification, that nothing is said or done by the

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party from whom the goods are received, calculated to deceive the carrier in respect to such value and contents.

As, for example, in *Gibbons v. Paynton*, (4 Burr. 2298,) where gold was concealed in an old nail-bag. In *Riley v. Horne, supra.*; and in *Balson v. Donovan*, (4 Barn. & Ald. 21,) the question was concerning the effect of a notice by the carrier, that he would not be liable unless the value was disclosed. Still, the Judges all recognize the principle of Gibbons and Paynton, that when the conduct of the owner is such as tends to deceive the carrier in regard to the nature and value of the property, he will not be liable.

These principles seem to us to sustain the ground taken by the defendants, in relation to the box of jewelry now in question. It was merchandize—it was of peculiar value—it did not belong to the traveller, but to a third person. The defendants were practically and effectually notified that the trunk which they undertook to carry was a traveller's trunk. They had a right to assume that it contained the articles usually carried by travellers on their journey. In short, it was held out to them as baggage; and we can see no reason for not extending to them the same protection which is afforded to carriers of baggage, who carry the person of the owner also. The authorities which have been referred to, and numerous others which are therein mentioned, warrant no distinction between carriers of passengers and carriers of goods, where the carrier is deceived, as to the nature or value of the property entrusted to him; and that deception may as easily be effected by imposing upon the carrier valuable merchandize, under the guise of the owner's travelling-baggage, as by a direct verbal misrepresentation.

The verdict cannot, we think, be sustained. A new trial must be ordered; costs to abide the event.

Ordered accordingly.

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BERNARD L. SIMPSON, Plaintiff and Respondent, v. WILLIAM GERARD & JOHN S. BETTS, Defendants and Appellants.

1. Where goods—in bond in the U. S. warehouse, the duty being unpaid—were sold by the defendants, as auctioneers, and, on receiving full payment therefor, they gave to the purchaser an order on the owners, requiring them to deliver the goods; and the purchaser received the order, and then agrees with the owners, that, instead of receiving the goods here, the owners paying the duties, they shall pay to him, and he will receive from them, the amount of the unpaid duties in other merchandise, and that the goods be shipped in bond to New Orleans; and, thereupon, such owners cause the proper entries of the goods to be made at the custom-house, for withdrawal and transportation, and give bond that the goods shall not be landed without the payment of the duties: the purchaser cannot afterwards revoke his instructions, and require the auctioneers to deliver the goods here.
2. The rule is the same, although the defendants, at the time of the sale, did not disclose the names of their principals.
3. Nor does it affect the liability of the defendants, that the return duties have not been actually paid by such principals; nor that the goods had not been actually shipped (in pursuance of the entries for transportation, and the giving of the bond,) until after the purchaser declared his desire to revoke his instructions and receive the goods here.
4. When the purchaser of goods, so sold, accepts an order therefor upon a third person, and makes a new and substituted arrangement, different from, and in lieu of, the original contract, and such third person enters upon the performance of such new contract, the auctioneers are discharged.

(Before BOEWSORTH, WOODRUFF and PIERREPOINT, J. J.)

Heard, Feb. 11th; decided, March 18th, 1858.

THIS action comes before the Court, on appeal from a judgment for the plaintiff, on the report of a referee.

The complaint of the plaintiff alleged, that, on the 18th of October, 1853, the defendants, acting as auctioneers, sold, at auction, to the plaintiff, as the highest bidder, two half-pipes of brandy, (of a particular brand, etc., specified,) for the sum or price of \$383.50, which was paid by the plaintiff to the defendants; that he frequently thereafter demanded the brandy, and the defendants have neglected and refused, and do neglect and refuse, to deliver; that the brandy is of the value of \$483.50. The plaintiff “demands judgment of delivery of said property, putting him in possession thereof, and damages for the detention thereof, in the sum of \$100,

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or for the value thereof, to wit: \$483.50, with interest from the day of payment thereof, 13th October, 1853, and for costs."

The answer of the defendants states, that they sold the brandy in their capacity of auctioneers; that it belonged to Theodore T. Edgerton & Co., doing business in this city; that, at the sale, the brandy was represented to be, and the plaintiff knew that the same was, in fact, stored in the United States bonded warehouse; that, after the said sale, the defendants made, and delivered to the plaintiff, an order on Edgerton & Co., their principals, for the brandy; which order the plaintiff accepted and, afterwards, presented to Edgerton & Co., and directed them to ship the brandy, still remaining in bond, to New Orleans, agreeing with them to receive and accept from them, in place of the payment of the duties by them at this port, the amount necessarily required by him to pay the duties at New Orleans, being the sum of \$48, which the said Edgerton & Co. have ever been, and still are ready to pay; and that, in accordance with the said directions, and in pursuance thereof, the said brandy was shipped to New Orleans, on account of, and to the order of, the plaintiff, and the bills of lading have ever since been, and now are, ready to be delivered to the plaintiff.

The defendants further deny, that the value of the brandy exceeds \$333.50.

On the trial, it was proved that the plaintiff purchased the brandy from the defendants, at auction, on the 13th October, 1853.

That the brandy belonged to Theodore T. Edgerton & Co., though the name of the owner was not known to have been announced at the sale.

That "the goods were sold in bond, entitled to debenture, the purchaser having the privilege of having the goods transferred to him in bond and the duties deducted from his bill, or the owner paying the duty, and the purchaser taking them out of bond."

That, on the 18th of October, the plaintiff paid to the defendants, the auctioneers, the full price of the goods, without any abatement for the duties, viz.: \$333.50; and the defendants gave to him an order on the owners, Theodore T. Edgerton & Co., for the brandy.

The plaintiff took the order to Edgerton & Co. Some difficulty appeared to have arisen in relation to procuring the goods from

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the warehouse, and one of the firm stated to him that, by a rule of the custom-house, the goods would have to remain a year longer in bond; but proposed that they would give him the same style of brandies here, or would ship the identical brandies to New Orleans in bond, and deduct the duties from his bill. To this latter suggestion, the plaintiff consented. He agreed to take the amount of the duties from Edgerton & Co. in claret wines; and directed Edgerton & Co. to ship the brandies to New Orleans, and to have the proper transportation papers made out, and he would call again. Edgerton & Co. thereupon caused the proper transportation entries to be made at the custom-house, and the goods passed for transportation; the directions for the shipment were given, and the bond, that the goods should not be landed without the payment of duties, was executed.

The plaintiff called after this was done, and went, with the clerk of Edgerton & Co., to the custom-house, and ascertained the amount of the duties to which he was entitled.

The transportation entries, or entries for shipment, in pursuance of the plaintiff's instructions, were made on the 21st of October.

On the 23d of October, the plaintiff appears to have changed his purpose; and, on or about that day, he called on the defendants, and said that the duties were not so much as he expected, and he wanted the brandies here. The defendants told him they had nothing further to do with it. At that time, he appears to have left at defendants' office, the order he had taken from them on Edgerton & Co. At about that day, the plaintiff's agent called on the defendants, and made inquiries on the subject, and was referred to Edgerton & Co., one of the defendants stating to him, that Edgerton & Co. were bound to deliver the brandies here if required, or, if exported, to pay the drawback. The agent went to Edgerton & Co., and stated to them, that the plaintiff wished the brandy delivered here; and was told that they had commenced passing the brandy at the custom-house for New Orleans, and showed him the papers.

There was some difference in the testimony, upon the question whether, at that time, the custom-house entries were fully completed; but the clerk of Edgerton & Co. testifies that this conversation was had by the agent with him, and that he then had the

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shipping papers; and the clerk from the custom-house testified that the entry for shipment was made on the 21st.

The brandy was, in accordance with the entry and bond, shipped to New Orleans, consigned to the plaintiff, or his order, by the officer of the customs, whose duty it is to ship goods withdrawn for shipment under bond.

The bill of lading appears to have been signed October 29th, and was executed in three parts, one of which was forwarded by mail to the address of the plaintiff at New Orleans.

The above statement of facts is in substantial accordance with the report of the referee, and corresponds with the view taken of the evidence by the General Term.

The referee held, as matter of law, that the plaintiff was entitled to recover, notwithstanding his dealing with Edgerton & Co., and reported in favor of the plaintiff, that he recover \$333.50, with interest from October 18th, 1853.

The defendants appealed.

James W. Gerard, for the defendants (appellants).

I. The new agreement made by the plaintiff with Edgerton & Co., the owners, by which the plaintiff agreed that the two half pipes of brandy purchased, should be shipped by Edgerton & Co. to New Orleans for him, (the plaintiff,) and the actual shipment thereof released the defendants from any obligation to deliver to him the brandy in New York, if they were ever liable as auctioneers to deliver the same to him; and their obligation, if they were ever under any, thus released or waived, could not be restored by the plaintiff, after the bond actually given, giving notice that he wanted the brandy here.

II. The defendants, acting only as agents for Edgerton & Co., and that fact being known to the plaintiff at the time he paid his bill, and at the time he received an order from the auctioneers on the owners, is equivalent to a notice given by the auctioneers at the time of the sale, that they were only acting as agents.

III. An auctioneer, who is known to be only acting as an agent in the sale of goods for others, is not liable for any claim made by the purchaser, if, on demand, he gives the names of the principals.

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IV. On the facts found by the referee, he should have ordered payment for the defendants.

J. S. Slanson, for the plaintiff, (respondent,) among other points not material to the question as considered by the Court, argued the following:—

I. The conversation between plaintiff and Edgerton & Co. was but initiatory to a contract, as there was no agreement as to the amount or price of claret wine to be taken in place of duties; and even if there had been a part delivery, no title would have passed, as there was yet something to be done between the parties in ascertaining the quantity or price. The conversation between plaintiff and Edgerton & Co., did not amount to a waiver, as Edgerton & Co. were third parties, and no consideration was paid by, or received from, Gerard & Betts, and the order on T. T. Edgerton & Co. was but an offer of substantive performance, which was not accepted by plaintiff. (*Rapey v. Mackey*, 6 Cow. 250; 2d Kent's Com. 496; *McDonald v. Hewitt*, 15 Johns. 349; *Fitch v. Beach*, 15 Wend. 221; *Ward v. Shaw*, 7 Wend. 404; *Andrew v. Dietrich*, 14 Wend. 81; *Outwater v. Dodge*, 7 Cow. 85; *Olyphant v. Baker*, 5 Denio, 379.)

II. The referee did find that the acts and transactions of the plaintiff did not amount to a waiver of his claim on Gerard & Betts; and Gerard & Betts all the while admitted that plaintiff was entitled to the brandy here.

III. To make a delivery effective, it must be made actually, or virtually, in accordance with the terms of the contract, but the shipment and forwarding bill of lading were not in accordance with, or performance of, the contract of Gerard & Betts with the plaintiff.

BY THE COURT. WOODRUFF, J.—The plaintiff, if not informed by the nature of the defendants' business, was notified, when he paid for the goods, that they were acting, in making the sale, as the agents for Edgerton & Co. He received from the defendants an order addressed to that firm for the brandy sold. On the negotiation which ensued, and in view of the alleged difficulty in delivering, in New York, the particular brandy sold, he con-

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sented to receive from Edgerton & Co., and they agreed to pay to him the amount of the duties, and that the brandy be shipped under bond to New Orleans, where he might pay the duties, and receive the goods, or he might export them without such payment, as he should prefer: and by his direction, they (Edgerton & Co.) undertook to ship the brandy to him, at New Orleans, in bond, and subject to debenture, or to exoneration from duties, if not landed there; and this was done. If the agents were, in the first instance, liable, personally, upon the contract of sale, this treating with Edgerton and Co., the actual principals, with knowledge of the agency, and the entry, by Edgerton & Co., upon the substituted performance directed by the plaintiff, discharged the defendants from any further responsibility.

The same result follows, if the agency of the defendants be laid out of view; for, although the defendants were, in such case, bound to deliver the brandy according to the terms of sale, still, if the plaintiff accepted an order on Edgerton & Co. for the brandy—entered upon the negotiation with them, and agreed to accept the duties, and receive the brandy in New Orleans, and directed the same to be shipped, and the brandy was shipped, in conformity with his directions, the defendants were discharged. From the time of the acceptance of their order upon Edgerton & Co., requiring a delivery of the goods according to the terms of sale, the defendants' relation to the transaction so far partook of the nature of a suretyship for such delivery, that a dealing by the purchaser with the persons on whom the order was drawn, and the making of a new contract with them, terminated all liability on the part of the defendants. In this aspect of the case, the defendants became liable to Edgerton & Co., who acted upon the defendants' order, and satisfied it by brandy, delivered according to the plaintiff's express direction.

The countermand given by the plaintiff of his directions to ship the brandy, came too late to affect the defendants, or re-instate the plaintiff in his original claim to enforce the contract of sale against them. The order was given to the plaintiff the 18th of October. Prior to the 21st, he had presented it, and made the arrangement referred to; and in pursuance of that arrangement, Edgerton & Co., on the 21st, entered the goods for withdrawal from store and exportation, and gave the bond required by law,

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that they should not be landed without the payment of duties, upon which a permit was issued for the shipment of the goods, under the direction of the custom-house officer whose duty it was to ship the goods. This was sufficient to conclude the plaintiff. Edgerton & Co. had then changed their relation to the property, and entered into new obligations at the custom-house—the plaintiff's directions were no longer revocable: his change of purpose was not announced until after all this had been done.

If it were conceded, that, as the party then actually entitled to the control of the brandy, he might even then have required Edgerton & Co. to give him an order for the goods, or such control thereof as would have enabled him to enter the goods again, for consumption or warehousing, at this port; that was a matter with which the defendants had nothing to do; it was to be done between him and Edgerton & Co.

Besides, he was not shown to have made any such request.

The brandy accordingly was shipped, in conformity with his instructions, and made, by the bill of lading, deliverable to him at New Orleans, as directed.

No further responsibility rested upon the defendants, and the referee should have so found.

Upon these facts there is no conflict of evidence.

The judgment should be reversed, and a new trial ordered—costs to abide the event.

Ordered accordingly.

WOODBUFF, Plaintiff and Respondent, *v.* WICKER, Defendant and Appellant.

1. When the holder of a bill of exchange, which has been accepted for the accommodation of the drawer, and has been entrusted to such holder to be negotiated by him for the benefit of such drawer, endorses and delivers it as security for his own performance of a contract which he employs his immediate endorsee to make, and such endorsee transfers it to a third person, the latter cannot recover against such prior holder and endorser without proof that the immediate en-

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- dorsee of the latter has some unsatisfied claim which it was endorsed to secure, or that the plaintiff took it in good faith, before maturity, for value paid.
2. When, on the trial of such an action, it appears that the plaintiff's immediate endorser (if himself the plaintiff) could not recover, because nothing is due to him, or because he has no demand against the defendant—enough is shown to establish that the transfer to the plaintiff will operate as a fraud upon the defendant, as between him and his immediate endorsee, if the plaintiff is permitted to recover.
 3. An endorsee, who is obliged to prove that a note or bill was endorsed to him, *bona fide*, and for value, before its maturity, in order to maintain his action, must prove, more than that the note or bill was seen "in a batch of other notes in a place where the plaintiff usually kept his securities," and the belief of the person seeing it there, that the plaintiff had advanced on the credit of that and other collaterals more than the amount of such bill.

(Before Bosworth and Woodruff, J.J.)

Heard, Dec. 18th, 1857; decided, March 20th, 1858.

THIS action comes before the Court on an appeal by the defendant, Wicker, from a judgment entered on the verdict of a jury in favor of the plaintiff. It was tried in June, 1857, before Mr. Justice Woodruff and a jury. Jacob D. Woodruff is the plaintiff, and James C. Wicker and William P. Sackett are the defendants. The defendant Wicker alone answered the complaint. No questions arose upon the pleadings.

The action is brought against Wicker, as second endorser of a bill of exchange for \$800, dated May 30, 1856, drawn by one McMakin on P. S. Devlin, payable 3 months after its date, to the order of the drawer, and endorsed by him and by the defendants, Sackett and Wicker.

It was accepted by Devlin for the accommodation of the drawer, and the latter placed it in the hands of the defendant Sackett, that he might raise money upon it for the drawer.

Sackett had, previously thereto, instructed one Bartlett to make a contract to sell for him 55 shares of Erie Railroad stock, at 55 $\frac{1}{2}$, at a short date; Bartlett made such a contract; Sackett, at the time, owned no Erie stock; but the case does not show, expressly, that Bartlett knew that fact. Wicker and Sackett were jointly interested in the profits anticipated from this contract. A bond, called a "Coal-carrying Bond," belonging to Wicker, was placed by Sackett in the hands of Bartlett, to indemnify him against loss, on his contract to sell the 55 shares of Erie.

Wicker, wishing his bond, and to induce Bartlett to give it up

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to him, endorsed the bill in question, as did Sackett also, and it was then delivered to Bartlett, as a substitute for, and in consideration of, his surrendering the coal bond to Wicker, which he did do.

Bartlett, by order of Sackett, purchased 55 shares of Erie, to replace the shares he had contracted to sell; but whether before or after the delivery of the bill in question to him, does not appear. Nor does it appear how much he contracted to pay for it, nor whether he, in fact, paid any thing for it; nor what was done with the stock so bought, nor whether he actually lost any thing by the transaction, or had incurred any liability by reason thereof.

When the defendant had proved these facts, and had rested his case, "the plaintiff called one Frungen, as a witness, who, being sworn, testified:—I am the clerk and bookkeeper of Bartlett; I know Dr. Woodruff, the plaintiff; I know that the plaintiff received this note or draft from Bartlett, as collateral security, and made advances upon it before it became due, probably to Bartlett; I could not say the amount he advanced upon that, but more than the amount of the draft, on that and other collaterals.

"*Cross-examined.*—I did not see the money paid or advanced; I have no means of knowing that the plaintiff made advances upon, or held the draft as collateral security, excepting from seeing it in a batch of other notes, in a place in Bartlett's office where the plaintiff usually kept his securities; I don't know when I saw it there; I was in the habit of keeping the collaterals for Dr. Woodruff at that time; I had the care of looking them over, and seeing when they became due; he made advances on that and other collaterals; I did not see plaintiff pay any money on this note, by check, or otherwise; I do not recollect of any entry on Bartlett's books, showing that he had received advances on this note or draft; I don't know the amount paid or advanced by plaintiff on the draft, or whether the amount lent was repaid to him.

"*Re-direct.*—I believe plaintiff did make advances on this; he did; he made advances on this and other collaterals.

"*Re-Cross Examination.*—I have no other means of knowing that he did make advances, except as I have stated.

"The plaintiff here rested his case."

The defendants thereupon moved for a nonsuit, on the ground:

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1st. That it appeared that the plaintiff was not the lawful owner or holder of the draft.

2d. That the draft never had valid or legal inception.

3d. That the proof failed to show that the plaintiff held the note for value, or received it before it became due.

4th. That the whole transaction was illegal and void, being in contravention of the statute against stock-jobbing.

The Court denied the motion for a nonsuit, to which decision the counsel for the defendant duly excepted.

The defendants' counsel then asked the Court to charge the jury, that if Bartlett had no title to the note or draft in question, no other party could derive a valid title thereto through him. Which proposition the Court refused to charge. To which the defendants' counsel duly excepted. The case was thereupon submitted to the jury, under the charge of the Court, and the jury rendered a verdict in favor of the plaintiff, for the amount of said draft and interest, as claimed in plaintiff's complaint, namely, for the sum of \$315.63.

Judgment having been entered on the verdict, Wicker appealed from it to the General Term.

R. W. Van Pelt, for the appellant.

Wm. A. Coursen, for the respondent.

BY THE COURT. BOSWORTH, J.—Even if it be assumed that the transaction between Bartlett and Sackett & Wicker was legal, so that the endorsement was a valid contract, and security in the hands of Bartlett, to the extent of any claim of the latter growing out of the transactions in relation to his contracts to buy and sell Erie stock, it does not appear that he has any such claim against either Wicker or Sackett.

Certainly, nothing is shown which would entitle Bartlett, if plaintiff, to a verdict for the amount of the note: as it does not appear that he has sustained actual loss on his contract to purchase, or on his contract to sell Erie stock, or that there is any actual liability resting upon him, by reason of either of said contracts.

On such evidence, the defendant would be entitled to a verdict, if Bartlett were the plaintiff in this action. As the transfer of the

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bill by Bartlett to the plaintiff, under such circumstances, would operate as a fraud upon the defendant, if the plaintiff is permitted to collect it, the latter, in order to recover, must show that he took it in the usual course of business, before maturity, and paid value for it.

The testimony of Frungen, when carefully examined, amounts to only this: From seeing this bill "in a batch of other notes, in a place in Bartlett's office where the plaintiff usually kept his securities," he believed, and had no doubt, and therefore stated as his conclusion from such premises, that the plaintiff had advanced, on this and other collaterals, more than the amount of the bill in question.

He states expressly, that he had no other means of knowledge than those already stated, and that he did not see any money paid or advanced on the bill in question, and that he does not know when he saw it in the place where the plaintiff usually kept his securities.

We think, that on such evidence the defendant was entitled to a nonsuit, on the ground that the plaintiff had failed to prove that he paid value for the bill; and that for the refusal of the Court to grant such motion, the judgment should be reversed, and a new trial granted, with costs to abide the event. (*Clark v. Dearborn*, 6 Duer, 309, 312.)

Ordered accordingly.

CROSS, Plaintiff and Respondent, *v.* SACKETT, *et al.*, Defendants and Appellants.

WARD, Plaintiff and Respondent, *v.* The same Defendants and Appellants.

1. When, in an action of tort for a false and fraudulent representation, the complaint avers, that the defendants, by means which it minutely details, were "fraudulently and illegally intending, and contriving to dispose of" property, (which purported to be shares of the capital stock of a company duly incorporated, and called "The Gold Hill Mining Company,") "at a false and fictitious value, for their own benefit, as individuals; and to cause it to be generally believed, that the said company possessed capital, or had property to the amount

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of one million of dollars in all; . . . "and that shares or interests in said capital were of great value, and a means of profitable traffic and of safe investment; and that, "by means of the aforesaid false and fraudulent acts, practices, deceits, statements, and representations of the said defendants, it had come to be generally believed in the City of New York, and was believed by the plaintiff, that the said Gold Hill Mining Company was, in fact, possessed of property of at least one million of dollars in value; and that shares and interests in such capital were of the value of, at least, five dollars per share, (the par value of each share,) and that the said company had, since the organization thereof, earned, over and above its expenses, at least, the sum of \$50,000," . . . "and so believing, and on the faith and credit of the aforesaid false and fraudulent acts, practices, and representations of the said defendants; of the falsity and fraud whereof the said plaintiff was ignorant; the said plaintiff did, on the 14th of April, 1854," purchase certificates of said stock, to the extent of 1000 shares, and paid \$3500 therefor, and that the interest acquired by the plaintiff thereby, was worthless; and "that by means of said false, fraudulent, and deceptive acts, practices, and representations of the said defendants, the said plaintiff has sustained damage to the amount of \$6000, for which sum, with the costs of this action, he demands judgment." Such a complaint is, in substance, a good and sufficient pleading, although it does not allege, that the plaintiff purchased of the defendants, or by reason of any immediate communication between him and them, in relation to such purchase.

2. There is, in substance, no difference between an averment, that by means of certain specified frauds of the defendants, (which are charged to have been practiced with intent to defraud the public generally,) the plaintiff was induced to make, and did make, a particular purchase; and an averment, that the defendants, by means of the same frauds, induced the plaintiff to make such purchase.
3. The averment, in either form, connects the fraud and damage as cause and effect, with sufficient certainty, to comply with all the essentials of a complaint good in substance.
4. What evidence will be sufficient to warrant the conclusion, that the defendants intended, by the means charged, and did, in fact, thereby fraudulently induce the plaintiff to purchase a thousand shares of such stock, is a question which does not arise on a demurrer to the complaint.
5. The fraud of the defendants and the injury to the plaintiff being, by the complaint, clearly connected, as cause and effect, and as the demurrer admits all the material allegations of the complaint to be true, it follows, that on a demurrer to such a complaint, the plaintiff is entitled to judgment.
"There is no wrong or fraud which the directors of a joint-stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies." (Per HOFFMAN, J.)
- * When a party projects, and publicly promulgates the scheme of a joint-stock company; when he causes the usual books to be opened, and allows, or causes the inscription of the name of a person as an owner of an interest to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right, directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power, authorizing a transfer at large by the party to whom he

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has given the certificate; when that representation induces an innocent person to advance his money;—the defendant's own individual act has created the privity of contract which the cases referred to, (in the Opinion of HOFFMAN, J.,) appear to demand; and he must be held responsible to any one who has been deceived." (Per HOFFMAN, J.)

(Before BOSWORTH, HOFFMAN, SLOSSON, WOODRUFF and PIKEFORT, J. J.)
Heard, February 27; decided, March 27, 1858.

THESE two actions come before the Court, on an appeal by the defendants in each action, from an order made therein, overruling their demurrer to the plaintiff's complaint. The order, in each action, was made at a Special Term held by Mr. Justice Duer, on the 27th of April, 1857.

The two appeals were argued together. The allegations in the complaint of Ward, are the same in substance, and are generally in the same words, as those in the complaint of Cross, excepting the difference in the name of the plaintiff as purchaser, and the dates and amounts of his purchases.

The defendants in each action, are Amos M. Sackett, Moses L. Holmes, John D. Maxwell, Henry W. Belcher, Franklin Osgood, Samuel Smith, Isaac H. Smith, and Nathaniel H. Wolfe.

The complaint of Cross alleges, that on the 13th of August, 1858, the defendant Holmes entered into a written agreement as the party of the first part thereto, with all the other defendants, except Wolfe and I. H. Smith, as the parties of the second part; and that it was delivered and accepted, and sets forth a copy of it, and avers, that no schedules were in fact attached to it.

By the terms of that agreement, Holmes "doth sell" to the said parties of the second part, "all the estates, mines, fixtures, and property described and set forth in the annexed schedule;" and said parties of the second part "agree to pay said Holmes, on receipt to them or their assigns, of the leases described in said annexed schedule, and delivering of the personal property therein mentioned," \$60,000; and on the 20th of September, 1858, "upon receipt of deeds of all the estates mentioned in said schedule" conveying a perfect title thereto (save incumbrances thereon, to the amount of \$125,000, to be created by Holmes in favor of, and be made payable to the original owners in four and six months, which the said parties of the second part were to assume and pay) to deliver forthwith to Holmes 30,000 "shares of the

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stock of The Gold Hill Mining Company, (a company to be formed on the basis of the property hereinbefore mentioned,) which property is to be divided and represented by" 200,000 shares, par value five dollars; 50,000 "of which is to be reserved by the new company as a capital, and to provide for the payment of the \$125,000 due, as before stated."

The complaint then avers, "that on or about, and not later than the 31st of August, 1853," all the parties named in the aforesaid agreement "made and signed an instrument in writing, (with no schedules attached thereto,) in these words, namely;" and sets forth a copy of it.

By its terms, in consideration of 60,000 shares of the stock of The Gold Hill Mining Company, the receipt of which it acknowledges, and the further number of 90,000 additional shares to be delivered on or before the 20th of September, 1853, they "assign and make over to the said Gold Hill Mining Company the annexed obligation and contract of Moses L. Holmes," and agree to pay him all sums which by said contract they had stipulated to pay him, "excepting the \$125,000 which is allowed to encumber the property before mentioned in said schedule annexed." They also thereby further agree to pay and deliver to Holmes the 80,000 shares of the said company's stock, "therein stated to be due to him," and authorize the company "to do in the premises all acts or things" which they could do, had they not assigned the said contract.

The complaint then proceeds thus:—

"But the plaintiff alleges, that at the time of the making and signing of the said instrument, there was not in existence any body corporate, or other association existing under the name of The Gold Hill Mining Company, other than as is next hereinafter stated, and, therefore, the plaintiff alleges and charges that the said instrument last above set forth was inoperative and void, and intended only to cover the fraudulent and illegal designs of the defendants hereinafter stated.

"That on the same thirty-first day of August, all the said defendants in this action, not being members of, nor composing any body corporate by the name of The Gold Hill Mining Company, jointly used and assumed the name of The Gold Hill Mining Company, and professing to act as a body corporate duly created

and existing, did, at a meeting in the City of New York, at which they were all present, jointly assent to, and adopt a resolution in these words, namely :—

'Resolved, That the Gold Hill Mining Company will accept the proposition made to them by A. M. Sackett and others, purchasers of the Gold Hill mines, per contract of Moses L. Holmes, for the sale of the same to the Gold Hill Mining Company, and pay said A. M. Sackett and others, as therein demanded.'

"That on the first day of September, in the same year, the defendant, Moses L. Holmes, made and signed an instrument in writing, of which, and the whole of which, the following is a copy :—

'I do this day agree to sell and convey to the Gold Hill Mining Company, the following property, to wit.'

(This agreement is copied at length into the complaint, and contains twelve several specifications or descriptions of property, embracing the fee of several parcels of land, comprising in all, between 500 and 600 acres; leases of various other parcels of land, steam engines, pumps, Chilian mills, smiths' shops, tools, horses, feed, rock-troves, whims, etc., etc., the location of which is not stated, except that one tract of eighty-eight acres is described as being 'one mile north-east of Gold Hill').

The complaint then avers, "that the actual value of the property in said instruments mentioned, did not exceed the sum of \$375,000 when wholly unencumbered, and over the incumbrances thereon, did not exceed the sum of \$250,000; and that a large portion thereof consisted only of leases or a right to use certain lands for a limited time for mining purposes.

"That notwithstanding the said pretended contracts, the said defendants have never acquired the title to the lands therein mentioned, nor any part thereof, as an association, or corporation, or otherwise, and that the title to said lands then was, and now is, in some person unknown to the plaintiff, as trustee thereof, who holds the same as security for the payment of the incumbrances thereon.

"That on the same first day of September, the said defendants in this action, not being members of, nor composing any body corporate, nor being otherwise authorized by law, fraudulently and illegally contriving and intending to cause it to be generally believed that they constituted a body politic and corporate, duly

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created and existing, and thereby to make great gains and unlawful profits in the carrying out of the said pretended contracts, and the disposal of said property, and jointly assuming the name of The Gold Hill Mining Company, did, without authority of law, fraudulently design, engrave, and print, and mutually deliver to each other certain papers, commonly called certificates of stock, to the purport and effect that the said The Gold Hill Mining Company was a corporation organized under the general law of the State of New York (meaning an act of the legislature of the State of New York, entitled "an act to authorize the formation of corporations for mining, mechanical, and chemical purposes," passed Feb. 17, 1848, and the several acts amendatory thereof); that the capital of such company consisted of 200,000 shares of \$5 each, and that the respective parties in such certificates mentioned, were respectively entitled to some interest in said capital stock; but not stating or purporting that such stock consisted of property purchased by said company, or that said certificates were issued in payment for such property; that one such certificate, purporting and stating that the said Amos M. Sackett was interested in said pretended capital, to the extent of 6000 shares thereof, was issued and delivered to, and received by the defendant, Amos M. Sackett; that a like certificate for 6000 shares was so issued to, and received by said Henry W. Belcher; that a like certificate for 12,000 shares, was so issued to, and received by said Moses L. Holmes; that a like certificate for 6000 shares was so issued to, and received by said John D. Maxwell; that four other like certificates for 10,000 shares in the aggregate were so issued to, and received by said Samuel Smith; and that a like certificate for 15,000 shares was so issued to, and received by said Franklin Osgood.

The complaint then proceeds as follows: "That in fact the said certificates, and each and every of the same, were false, fraudulent, and deceptive; inasmuch as there was no association or body corporate, organized or created under the general law aforesaid, by the name of The Gold Hill Mining Company, and inasmuch as the said The Gold Hill Mining Company had not, in fact, any capital consisting as in said certificate stated, nor any other capital; and the said persons, in said certificates respectively mentioned, had not the respective interests in any such capital as

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are in such certificates respectively stated and averred; and inasmuch as the said property pretended to be purchased as aforesaid, was of no greater value to said corporation than the sum of \$250, 000, and was incapable of being divided into 60,000 shares, of \$5 each, being the number of shares thereof falsely purporting to be represented by said certificates of stock; all which matters above stated, the said defendants in this action then well knew. That on or about, and not before, the third day of September, in the same year, the said defendants, Moses L. Holmes, Samuel Smith, and Franklin Osgood, caused to be filed in the office of the Clerk of the City and County of New York, a certificate duly acknowledged by them on the 31st day of August, 1858, of which, and of the whole of which, a copy follows in these words:

'The subscribers, being desirous to become a body corporate in fact and in name, under, and in accordance with the law of the State of New York, passed February 7, 1848, entitled an Act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes, as amended June 7, 1853, do hereby make, sign, and acknowledge this certificate as and for our certificate of incorporation, as required by section 1 of the aforesaid act.

'The corporate name of this company shall be The Gold Hill Mining Company.

'The object for which the company shall be formed shall be for mining and manufacturing purposes. The amount of the capital stock shall be one million dollars.

'The term of the company's existence shall be twenty-five years. The number of shares of which the stock shall consist shall be two hundred thousand.

'The number and names of the trustees who shall manage the affairs of the company the first year, or until others are duly elected, shall be as follows: Henry W. Belcher, A. M. Sackett, Moses L. Holmes, Samuel Smith, Isaac H. Smith, Nathaniel H. Wolfe, and Franklin Osgood.

'The operations of the company shall be carried on in the City, County, and State of New York, and in Rowan County, in the State of North Carolina.

'**NEW YORK, August 30, 1858.**

'**SAMUEL SMITH,**

'**FRANKLIN OSGOOD,**

'**M. L. HOLMES.'**

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"Whereby, as the said plaintiff is advised and believes, the said defendants, Samuel Smith, Franklin Osgood, and Moses L. Holmes, did become, on the said third day of September, and not before, in fact and in name, a body corporate, and as such entitled then to use, for the first time, the aforesaid name of 'The Gold Hill Mining Company ;' and that immediately thereafter the others of said defendants in this action became, and were, associated with them in the management, direction, and control of the affairs and business of said corporation, and assisted at, and joined in, the commission of the several fraudulent acts and representations hereinafter set forth.

"That no payment whatever in cash to the capital stock of said corporation was made, or subscribed for, or promised, or agreed to be made or subscribed for by any person or persons whomsoever; that the only cash ever received by the defendants or by said corporation, by way of contribution to the capital of said corporation, consisted in the sums hereinafter alleged to have been received upon the fraudulent issue of certificates of stock, and that no conveyance of the said lands above mentioned was ever made by said defendants, or by any other person, to said corporation; but that the said defendants, well knowing the premises, but fraudulently and illegally intending and contriving to dispose of the said property at a false and fictitious value, for their own benefit as individuals, and to cause it to be generally believed that the said company possessed capital, or had property to the amount of one million dollars in all, and that the several parties in said certificates, named as aforesaid, had contributed, in cash, to the capital of said company the sum of three hundred thousand dollars in all, did authorize, direct, and assist the said Amos M. Sackett, John D. Maxwell, Franklin Osgood, Samuel Smith, Moses L. Holmes, and Henry W. Belcher to hold said certificates, and the pretended shares falsely purporting to be represented thereby, as a payment for said property under color of a pretended sale thereof to said corporation, and upon no other consideration whatever, and for their own sole benefit as individuals, and as being true in fact, and as truly representing the extent and value of the respective interests of the said parties in the said pretended property of said company; and the said Amos M. Sackett, John D. Maxwell, Moses L. Holmes, Franklin Osgood, and Henry W. Belcher

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did thereupon, by and with the knowledge, consent, and assistance of others of the said defendants, fraudulently put in circulation, sell, pledge, and dispose of the certificates so fraudulently issued and delivered to them as aforesaid, and the pretended shares and interests purporting to be represented thereby, to sundry persons whom the said plaintiff is unable more particularly to specify, but who, as he charges, are well known to the said defendants, and that for their own sole benefit, and without paying to said corporation therefor any sum of money whatsoever.

“That the said defendants, fraudulently and illegally intending and contriving, as aforesaid, and also contriving and intending to cause it to be believed that the said Samuel Smith had contributed, in cash, to the capital of said corporation the further sum of twenty thousand dollars, did also, in the name of said corporation, and under color of its corporate character and privileges, but in violation of its corporate rights and duties, but under color of the pretended obligation of said pretended contracts, and upon no other consideration whatever, fraudulently and illegally make and deliver to the said Samuel Smith, for his own use, on or about the ninth day of September, eighteen hundred and fifty-three, one other certificate of stock, purporting and representing that said corporation was duly organized under said general law, and that the capital thereof consisted of two hundred thousand shares, five dollars each, and that the said Samuel Smith was interested in such pretended capital stock, to the extent of four thousand shares thereof, and not purporting or stating that said certificate was issued for property purchased by said corporation; which last-mentioned certificate was sold, pledged, or otherwise disposed of by the said Samuel Smith, for his own sole use and benefit, and without the payment, to said company therefor, of any sum of money whatsoever.”

(Then follow allegations similar in all respects to the last preceding ones, as to the issuing and delivering to the said Amos M. Sackett, Henry W. Belcher, Moses L. Holmes, Franklin Osgood, John D. Maxwell, and Samuel Smith, of sundry other certificates of shares of said stock, amounting in all to eighty-six thousand shares.)

The complaint then proceeds as follows:—

“Which last-mentioned certificates and the pretended shares or

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interests purporting to be represented thereby, were delivered to and sold, pledged, and otherwise disposed of by the last-mentioned defendants for their own benefit, and without paying to said corporation therefor any sum of money whatsoever. That, on or about the seventh day of September, aforesaid, the said defendants, illegally contriving and intending as aforesaid, and further contriving and intending to cause it to be believed that the said corporation had received as a cash payment towards its capital, the sum of twenty-five hundred dollars, illegally and fraudulently made and issued to one Francis Skiddy, for his own use, a certain other certificate not issued in lieu of any certificate theretofore issued, purporting and representing, that the said Francis Skiddy was interested in the said pretended capital stock, to the extent of five hundred shares thereof, and that such capital consisted of two hundred thousand shares, five dollars each; but the plaintiff alleges, that the only consideration or value received by the defendants or paid into the capital of said company, on the issue of said certificate, was the sum of twelve hundred and fifty dollars."

(Here follow allegations, in like terms, as to the issuing, on the 28th of January, 1854, to John Peters, of certificate No. 664, for 2000 shares; to E. Sprague, of certificate No. 665, for 1000 shares; to J. C. Beach, of certificate No. 666, for 1000 shares; to James Lees, of certificate No. 667, for 1500 shares; to Francis Skiddy, another certificate, No. 668, for 500 shares; to J. B. Thompson, of certificate No. 669, for 1700 shares; to Amos M. Sackett, of certificate No. 670, for 300 shares; to R. W. Trundy, of certificate No. 671, for 500 shares; to Rufus Story, certificate No. 672, for 300 shares; and on the 9th of February, 1854, to Silas Ludlum, certificate No. 701, for 100 shares; to J. D. Fish, certificate No. 702, for 100 shares; and on the 18th of February, 1854, to Thomas Burridge, certificate No. 726, for 100 shares.)

The complaint then proceeds thus:—

"Whereas, in truth, and in fact, and the defendants well knew, that no one of the said parties named in said certificates issued on the said twenty-eighth day of January, and on the ninth and eighteenth days of February, 1854, had paid, or promised, or agreed to pay, in cash, or otherwise, into the capital of said cor-

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poration, more than the sum of three dollars for each share of said pretended capital, purporting to be represented by said certificates respectively; and each of said certificates was an original certificate, not issued in lieu of any other certificate theretofore issued, and then surrendered; and each of said certificates stated, and represented, that the said, 'The Gold Hill Mining Company' had been duly organized under said general law, with a capital of two hundred thousand shares, at five dollars each.

"And the plaintiff alleges that no certificates of stock were issued by the said defendants, prior to the 14th day of April, 1854, upon any other consideration to them, or said company, or for any other stock than as is above stated, nor, except the surrender of some of the said certificates.

"And the plaintiff further shows, that it is the usage and custom of corporations organized under the said general law, and doing business in the City of New York, to attach to, or endorse upon certificates of stock issued by them, a skeleton form of a power of attorney, for the purpose of enabling the persons to whom such certificates are issued, and their successors in interest, to transfer the same, and the interest and share of such persons, and their successors, respectively, in the capital stock of such companies, with facility, and without entering every such transfer upon the books of such companies, or otherwise notifying such companies of such transfers; and that it is also the usage and custom of persons to whom such certificates are issued, and who are named in the body of such certificates, to execute such form of power of attorney in due form, but without inserting therein the name of any attorney, or any transferee; but upon transfer of such share and interest, to deliver the original certificate received by such person or persons to the transferee or successor in interest of such person, with such skeleton form, executed as aforesaid, and with authority to insert, in such form, the name of such attorney and transferee, as such transferee himself may designate; by means of which usage and custom, shares and interests in corporations created by virtue of said law, are sold, pledged, and otherwise disposed of, from hand to hand, with great facility, and, for that reason, are much sought after, for the purposes of lawful traffic and investment, and have an enhanced value: that the said defendants, at the several times of issuing

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and delivering the said certificates, as aforesaid, well knew the said usage and custom, and caused to be appended to each of said certificates a skeleton power of attorney, in the words following, namely: 'Know all men by these presents, that do hereby appoint attorney irrevocable for to sell and transfer to the whole, or any part of the above-named shares, with power, one or more attorneys under to appoint for that purpose. Witness hand and seal, this day of 18 . In presence of:' and that in so issuing and delivering the said certificates, with such forms attached, the said defendants knew, and intended that such certificates, and the shares or interests purporting to be represented or evidenced thereby, would become, and be easily current and negotiable as evidences of property, and subjects of traffic from hand to hand, without inquiry, or opportunity to examine the books or affairs of the said 'The Gold Hill Mining Company.'

"And further, the plaintiff alleges that the said defendants, well knowing the premises, and fraudulently and illegally contriving and intending to give a fictitious value to the said certificates, and to cause it to be generally believed that they possessed the said capital of one million dollars, and that shares or interests in said capital were of great value, and a means of profitable traffic, and of safe investment, did, from time to time, publish and declare, in newspapers published in said City of New York, that the persons interested in said capital were entitled to dividends of money out of the profits of said company's business, and, in particular, on the second day of November, eighteen hundred and fifty-three, did cause it to be notified and announced to the public at large, that the directors of said company had, on the said day, declared a dividend of two per cent. from the business of the first two months, ending on the twelfth day of said November, which dividend was payable on the twenty-fifth day of the same month; and, in accordance with such notification, did, on the twenty-sixth day of November, eighteen hundred and fifty-three, pay, in cash, to sundry persons interested in said stock, as a pretended dividend out of the earnings of said company, the sum of fifteen thousand and fifty dollars; whereas, in truth, and in fact, the defendants well knew, and so the plaintiff

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alleges, that the said company had not earned or received, as profits, the said sum, so paid out for dividends on its business, during the said two months.

"And, further, that on or about the fourth day of January, eighteen hundred and fifty-four, the said defendants, illegally and fraudulently intending, and contriving, as aforesaid, did cause it to be publicly notified and announced in the City of New York, that the directors of the said company had declared a dividend of two per cent. from the business of the two months, ending on the twelfth day of said month of January, and payable on the first day of February then next; and, in accordance with such notification, did, on or about the said first day of February, eighteen hundred and fifty-four, pay, in cash, to sundry persons interested in said stock, as a pretended dividend out of the earnings of said company, the sum of fifteen thousand and fifty dollars; whereas, in truth, and in fact, the defendants well knew, and so the plaintiff alleges, that the said company had not earned, or received, as profits on its business during the said two months, the said sum so paid out; and a large part of the said sum was, in fact, paid out of the capital stock thereof, or by the use of money borrowed for that purpose: that, on or about the twenty-second day of March, eighteen hundred and fifty-four, the said defendants caused it to be notified and announced to the public at large, that the directors of said company had, on that day, declared a dividend of two per cent. from the business of the two months ending on the twelfth day of said month, and payable on the first day of April then next; and, in accordance with such notification, did, on the said first day of April, pay, in cash, to sundry persons interested in said stock, the sum of fifteen thousand nine hundred and sixty dollars, as a pretended dividend out of the earnings of said company; whereas, the defendants well knew, and, so the plaintiff alleges, that, in fact, the said company had not earned, or received, as profits on its business, the said sum so paid out; and a large part of the said sum was paid out of the capital of said company, or out of money borrowed for that purpose.

"And the plaintiff further shows, that on the fourteenth day of April, 1854, by means of the aforesaid false and fraudulent acts, practices, statements, and representations of the said defendants,

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it had come to be generally believed in the City of New York, and was believed by the plaintiff, that the said 'The Gold Hill Mining Company' was in fact possessed of property of at least one million dollars in value, and that shares and interests in such capital were of the value of at least five dollars per share, and that the said company had, since the organization thereof, earned over and above its expenses at least the sum of fifty thousand dollars; and the said certificates, so issued by the said defendants as aforesaid, or other certificates of like tenor and effect, which had been issued by the defendants upon the surrender to them of some of the said original certificates, were, with such skeleton powers of attorney as aforesaid, in circulation and in course of sale, pledge, and other disposition, in the City of New York, and were believed by the public generally, and by the plaintiff in particular, to be true and genuine evidences or representatives of actual interests in an existing capital to the amount of one million of dollars; and, so believing, and on the faith and credit of the aforesaid false and fraudulent acts, practices, and representations of the said defendants, of the falsity and fraud whereof the said plaintiff was ignorant, the said plaintiff did, on the aforesaid 14th day of April, 1854, purchase of one Richard Schell, then being the holder of one of the aforesaid original or substituted certificates, an interest in the said capital stock to the extent of one thousand shares thereof, and paid therefor the sum of thirty-five hundred dollars, which the said plaintiff then verily believed to be less than the actual value of the interest so purchased by him, and received from said Schell the said certificate so held by him, with such power of attorney in blank, but duly signed, and executed, and thereto attached; which certificate the plaintiff thereupon surrendered to the said 'The Gold Hill Mining Company,' and received from the defendants in lieu thereof as a true and genuine evidence and representative of the plaintiff's supposed interest in said pretended capital, one other certificate numbered 856, dated April 14, 1854, purporting and representing that the said 'The Gold Hill Mining Company' was duly organized as aforesaid, with a capital of two hundred thousand shares, five dollars each, and that said plaintiff was interested in such pretended capital to the extent of one thousand shares thereof, and the said defendants transferred one thousand shares of said capital to the plaintiff,

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whereas, in fact, the said statements and representations contained in said certificate held by said Schell were false, fraudulent, and deceptive, and neither said Schell nor his predecessor in interest had contributed to the capital of said company the sum of five thousand dollars, either in cash or other property, and the interest supposed and pretended to have been acquired by the plaintiff was in fact worthless. That, by means of said false, fraudulent, and deceptive acts, practices, and representations of the said defendants, the said plaintiff has sustained damage to the amount of six thousand dollars, for which sum, with the costs of this action, he demands judgment."

The defendants, in each action, demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer stated, in nine several specifications, the defects imputed to the complaint, and relied upon as rendering it insufficient as a pleading. These defects are included among those assigned in the points of the appellants, as grounds for reversing the orders appealed from.

The demurrs, having been overruled at Special Term, from the orders overruling them the present appeals were made.

Platt, Gerard and Buckley, and C. O'Conor, for defendants, the appellants.

I. If the defendants obtained stock from the company without paying for it, or violated good faith, or committed a breach of trust in their dealings with the company, or in their sales to the company, the remedy is an action by the company, in its corporate name and capacity. If they unlawfully misapplied any funds of the company in the payment of dividends not properly declared, a similar action is the appropriate remedy. (*Robinson v. Smith*, 8d Paige, 282.)

II. The only way in which an individual stock-holder can invoke the aid of a court, in reference to injuries thus affecting the interests of a corporation, is by an action on behalf of himself, and all other injured stock-holders, charging the present officers or managers of the company with complicity in the wrong, or showing their refusal or neglect to redress it by suit. Such an action would necessarily seek an account, and the corporation

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itself would be a necessary party to it. The complaint now before the Court does not contain the essentials of such a case. 1. Such a case would come under the head of equity, and would be triable by the Court. 2. It would require a very special judgment rectifying, in conformity with the calls of justice, all the complicated mischiefs which such a state of things necessarily induces. These mischiefs usually affect the various persons connected with the company in very different degrees. 3. The present is a simple, common law action for damages to a particular individual for an alleged injury. Nothing but his pecuniary claim to compensation for his own supposed individual loss and injury is presented, and the action is consequently triable by jury. (*Robinson v. Smith*, 3 Paige, 233. *Cunningham v. Pell*, 5 Paige, 612.) Laying out of view all the objections which might be made for indefiniteness and vagueness of statement, and also every objection for the want of any particular allegation which could be supplied, the complaint may be treated as intending to charge, that the defendants fraudulently got up a mere bubble corporation, employed puffers to give its stock a high character by maps, pictures, writings, and speeches; that they were thereby enabled to palm off worthless shares upon Richard Schell, or some of his predecessors, in the line of purchase; and that, whilst the public mind remained under the influence of a delusion thus created, the plaintiff, participating in the general opinion, purchased from Schell. Such a state of facts would not entitle the plaintiff to maintain an action. 1. Such bubbles are not novelties in trade, legislation, or juridical science. They are abundantly exemplified in the histories of France and of England, between the years 1715 and 1722. (Encycl. Britannica, "John Law," Lempriere's Biography, "John Law," 3d Encycl. Britannica, 746, Edinburgh ed., 1797, Article "Bubbles;" Westminster Review, vol. 46, p. 36.) 2. The pretence of these schemes was "for carrying on some useful branch of trade, manufacture, machinery, or the like. To this end, proposals were made out, showing the advantages to be derived from the undertaking, and inviting persons to be engaged in it. The sums necessary to manage the affair, together with the profit expected from it, were divided into shares, or subscriptions, to be purchased by any disposed to adventure therein." (See same page of Encycl. last cited.) The evil was,

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that some of the first subscribers sold their "subscriptions at a great profit, whereby the last buyers were losers." (7 Cobbett's English Parliamentary History, 658-9. See same book, p. 651 to 912.) 3. The common law contained no principles which would make the getter-up of such a company responsible to a remote purchaser with whom he had no dealing, and whose act in purchasing he in no wise directly procured. Consequently, in the South Sea case, the British Parliament, by an arbitrary stretch of power, confiscated the estates of the managers to make good the losses of the company. (Cobbett's Parl. His., 856, 834, 832; Id., Note to p. 827; 7 Geo. I., ch. 27; 7 Geo. I., ch. 32, second statute.) 4. The practices of the South Sea managers had given rise to an immense multitude of similar schemes, some account of which may be seen in 7 Cobbett's Parliamentary History, page 655, and onward in a note. (See also note to page 662.) And, because the common law afforded no remedy to the remote purchaser, an Act was passed in 1719, giving an action in such cases. This statute never was in force in this State, nor was any like statute ever adopted here. (7 Stat. at Large, p. 308 sec. 20.) 5. The existence of the statute last referred to, and the total absence of any judicial precedent for the maintenance of a civil action at common law by a remote purchaser in such a case, conclusively establish the negative above asserted at the close of this point. (36 Eng. L. & Eq. R. 273; 19 Johns. 226; 18 Vermont, 126.)

- III. The cases in which an action was sustained for an injury suffered by one not aimed at by the *tortfeasor*, afford no analogy in support of the notion above combatted in the second point. 1. The Squib case (*Scott v. Shepherd*, 2 Wm. Bl. 892; 2 Smith's Leading Cases, 210) involved little else in its discussion than the question of form, whether the action should be case or trespass. In point of principle, it proves no more than that he who sets a destructive physical agent in motion, is responsible to the party who suffers an injury from its action, notwithstanding the intervening agency of other persons in directing or modifying its course. 2. The case of the loaded gun placed in the hands of a young and inexperienced girl (*Dixon v. Bell*, 5 M. & Selw. 198); the case of a horse and cart negligently left unattended in the highway (*Lynch v. Hurdin*, 1 Ad. & Ellis, N. S. 29; 5 Car. & P.

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190); and the case of the poisonous drug labelled with the name of a simple and harmless medicine (*Thomas v. Winchester*, 2 Seld. 411), are all exemplifications of the rule that civil responsibility attaches to him, who, having the mastery and control of a destructive physical agent, either wantonly and mischievously, or by neglect, places it or leaves it in such a condition that, in the usual and natural course of things, its action may work an injury to others, and injury, in fact, ensues to their persons or property. Perhaps this principle was never denied in any case; for nothing is decided in any of these cases except the negative of an irrational distinction attempted to be set up, i. e., that the active intervention of a third person necessarily shifted the responsibility to the latter. (1) The main principle of these cases is involved in the old and familiar rule, that he who keeps a dog accustomed to bite mankind, etc., is responsible for all the mischiefs done by him. (*Brown v. Giles*, 1 C. & Payne, 118, note a; 11 Com. Law R.; Com. Dig. Action on Case for Negligence; A. 5 and notes; 5 C. & Payne, 1, 190; 24 Com. Law.) (2) It was probably involved in the cases arising under the atrocious English practice of setting spring guns, to kill or grievously wound trespassers. These cases were unjustly decided. (*Ilett v. Wilks*, 3 B. & Ald. 304; 5th Com. Law; Sidney Smith's Works, 154; Id. Edinburgh Review, for 1821, vol. 35, pp. 123, 410.) (3) The notion which these cases repudiate, is singularly absurd. Every one would say so, if a man were to place a basket of poisoned victuals on the highway, and a poor man having found and given it to his children, one of them should sue the trap-setter for damages. Surely, in *Van Bracklin v. Fonda*, (12 John. 468,) the plaintiff's servants, who ate the unwholesome provisions sold by the defendant to their master the plaintiff, had a right of action. (4) Indeed, there is no distinction between the compulsory or unwitting co-operation of a responsible individual, and the agency of inanimate matter, as a gun, etc. And so the Supreme Court held in the case, where a boy, terrified by the axe-in-hand pursuit of the defendant, ran against the faucet of plaintiff's wine-cask, and, knocking it off, spilt the contents. (*Vandenbergh v. Truax*, 4 Denio, 464.) (5) *Langridge v. Levy*, (2 Mee. & W. 519,) was decided against the defendant. It may well be doubted whether the decision should not have been the same way, independently of any contract be-

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tween the gunmaker and the father, that the gun was to be for the use of the son, who was plaintiff. The principle is above adverted to. It may also be doubted, whether the same principle should not have been applied in favor of the plaintiff, in the case of the ill-constructed naphtha lamp. (*Longmeid and Wife v. Holliday*, 6 Eng. L. & Eq. 565.) (6) The case of the driver's action against the builder of his master's stage-coach, seems over the line. To sustain such an action, might be carrying liability for ulterior consequences to an unreasonable and inconvenient length. (*Winterbottom v. Wright*, 10 M. & W. 109.) 3. The balloon case (*Guille v. Swan*, 19 John. 383) rests on a principle which has not the remotest relation to the case supposed in Point II. There the defendant was considered as having requested the crowd who caused the damage to do the act from which the damage resulted. (1 Denio, 584; 4 Denio, 467; Com. Dig. Action on Case for misfeasance, A. 7, 9 East. 277. 4. The case of *Allen v. Addington*, (7 Wend. 9; 11 Wend. 374,) and the case of an open letter of recommendation falsely and fraudulently issued recommending a servant, rest on the distinct ground, that the defendant authorized and intended as against somebody the precise injurious deceit, which was the subject of the action, the actor therein being *quoad hoc* his agent. But if Allen who sold Baker on Addington's recommendation had pinned Addington's commendatory letter to Baker's note for the purpose of giving it credit, and on the strength thereof had obtained a discount of the note, the discounting bank could not have sued Addington for fraud. 5. The proposition, that he who commits a deceit upon A, is responsible for every injury which may result to third persons from dealing with A, who in such latter dealing are misled by the instrument which deceived A, has no countenance in the authorities, and would be a most dangerous and mischievous extension of the supposed principle of the Squib case. (1) *Gerhard v. Bates*, (2 Ellis & Blackburn, 476,) was decided on demurrer, and the declaration contained averments of direct action against the plaintiff by the defendant. (2) The reasoning of the Court in that case, and in the case above cited from 6 Eng. L. & Eq. 565, confirm the proposition in this division 5.

IV. The mere circumstance that an act is criminal, does not render the perpetrator liable for consequences more remotely re-

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sulting from the act, than if it was merely wrongful. If Judge Gardiner intended to affirm the contrary in 2 Selden, 411, he erred. 1. In order to sustain an action for a special injury sustained by reason of a criminal act, the injury "must not only be peculiar to the plaintiff, but a direct and immediate consequence of the act." The rule is the same as to wrongful acts not criminal. (18 Ver. R. 126, 3d point.) 2. So far from the criminal nature of the act being an element in aid of a special action on the case, it is, in some sense, an impediment; for where such an act produces a general injury, of the same nature, to the whole people, or to all of a particular class, or to all circumstanced as the plaintiff is, the rule is that no action will lie. And this to prevent multiplicity of suits, and for the very reason that the act is criminal, and is provided, as such, with a remedy appropriate by the law to redressing it, i. e. indictment. (*Butler v. Kent*, 19 John. 226; Com. Dig. Action B. 2; Id. Action on case for nuisance, C; 18 Vermont R. 125, second point.) (1) The action of the crime itself may create a civil responsibility of the criminal to any one whom it injures. (2) And this, on the same principles as the rule that the action of a destructive agent created and put in a way to do harm, involves like responsibility. (*Coleman v. Riches*, 29 Law and Eq. R. 323, 326, per Williams, J.) But if A forges a bond and sells it to B, who afterward sells it to C, the latter cannot maintain an action against A, either for the forgery or the sale.

V. That every wrong or injury shall be remediable by action, against anybody and everybody, who, meditately or immediately, by negligence, or any breach of law, or any moral wrong, in any degree contributed to produce it, is a proposition not to be maintained on authority or reason. *Ubi jus ibi est remedium* cannot receive so free and latitudinarian a translation, even under the Code. (Com. Dig. Action B, 7; *Smith v. Lewis*, 8 Johns. R. 169; *Grove v. Brandenburg*, 7 Blackford, 234; *Cunningham v. Brown*, 18 Vermont, 126; *Revis v. Smith*, 36 Eng L. and Eq. 273.)

VI. The injury complained of by the defendant, in the aspect of his case, above suggested by the second Point, is, that he did not receive the contemplated benefit of a bargain. Essentially, and according to the substance of the thing, his claim has its foundation in contract. If R. Schell kept his contract, there could be no injury; and it is a settled rule, that the election of remedies

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given to a party injured by deceit in a contract, to bring an action sounding in tort, or on the contract, shall not enlarge or vary his right. 1. A sale is a contract executed. (*Fletcher v. Peck*, 6 Cranch, 136-7; 17 Johns. 215; 11 Peters, 573.) 2. There was, on the part of R. Schell, an implied, if not an express, warranty, that the stock sold was real, and not fictitious, and that it had been paid up in full. (*Williams v. Matthews*, 3 Cow. 252; *Herrick v. Whitney*, 15 Johns. 240; *Furniss v. Ferguson*, 15 New York R. 440, 576.) 3. The right to sue in tort, or on the contract, in such cases, is a mere choice of remedies. 4. By adopting a form *ex delicto*, the plaintiff cannot involve a party who could not have been charged *ex contractu*. (*Jennings v. Rundall*, 8 T. R. 357; *Green v. Greenbank*, 4 Eng. Com. Law R., 375; S. C. 2 Marshall's R. 485; 1 Southard, 87; 1 Levin, 247; Com. Dig. Action on the case B, 5, last case; *Fairhurst v. Liverpool Loan Ass.* 26 Eng. L. and Eq. R. 393; *Price v. Hewett*, 18 Eng. L. and Eq. 524; *Vasse v. Smith*, 1 Am. Leading Cases, 261, 4th ed.)

VII. In fact, the complaint, rightly understood, contains no allegations of fraud or illegality. 1. The complaint does not show or allege, that the defendants, or the certificates suppressed or concealed any fact which the defendants ought to have disclosed, or the said certificates ought to have contained, or which the plaintiff could not have found out, on the slightest inquiry, at the office of the company. The contents of the certificate delivered to the plaintiff are set forth in the complaint. The theory of the complaint is, that the certificates represented on their faces, that the capital of the company amounted to a million of dollars, and had been paid in cash, and that the defendants, if they are to be the parties who are to be responsible for the issue of them, should have stated that the certificates were issued on the purchase of the property by the company. 2. The answer is, *firstly*, that the certificate itself does not pretend to state that any money has been paid in; it merely states the number of shares of which the company is composed, and what is the nominal par of those shares; it is a mere statement of what would be found in the certificate of organization; which the law makes a matter of record, and which the plaintiff could have inspected. (1 R. S. 4th ed. p. 1215, § 19; Id. 1220 § 43; 5 Hill, 303.)

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There is no averment of application or inquiry, as to its capital, or basis of formation.

Secondly. The plaintiff misconstrues the certificate; the nature and extent of the interest required by the purchaser thereunder is simply that, as holder, he becomes entitled to the proportion of all the assets of the concern, which the number of his shares bears to the whole amount of shares composing the aggregate capital.

A certificate of stock is a mere designation of the interest of the holder in the corporate fund, and does not purport to give him any money, or representative of money whatever, and the very nature of a mining company repels the idea that the capital consists in money. (Angel & Ames on Corp., §§ 556, 550.)

The term "capital stock" does not import or convey the idea of money exclusively; it means, in the eyes of the law, whatever is the basis, for conducting the business of the company. (*Mutual Ins. Co. of Buffalo, v. The Supervisors of Erie*, 4 Comstock, 445.) And *thirdly*. We remark that, on the plaintiff's own showing, all the stock issued to the defendants, and which they were concerned in selling, was issued on the faith of a contract of sale entered into by them with the Gold Hill Company, with the provisions of which the company can, of course, compel them to comply. The purchase was authorized by law, (Laws of 1853, p. 705) in a way in which this was made, and the stock so issued is to be declared and taken to be what the certificate represented—namely, full paid up stock. 3. The declaration of dividends unconnected with any affirmation as to the condition or prospects of the company, is no representation at all. The use of the terms in that connection, fraudulently and illegally contriving, etc., do not import fraud, unless the facts amount to it. The declaration of an unearned dividend makes the parties responsible to the creditors of this concern, but not to its stockholders. There is an end of their liability. The language of the allegations, in reference to the dividends, is very general, and would apply even to a mere clerical or other mistake in the calculation of the profit and loss of the company, even to the extent of a thousandth part of two per cent. of the dividend declared, as the complaint does not allege that no profit was made, or dividend earned, but only that the exact amount declared was not earned. This might have been the result of mistake, or error in judgment, or valuation in property.

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VIII. There is a misjoinder of causes of action ; those affecting and relating only to the organization of the company, (with which the defendants, Wolfe and Isaac H. Smith had nothing to do) are united with claims arising subsequent to the organization of the company, when they, for the first time, appeared on the stage. It is plain, that the causes of action in the complaint set forth, from their very nature, cannot affect all the parties to the action, under the provision of section 167 of the Code. (*Wells v. Jewett*, 11 How. S. T. R. 134.)

IX. The orders appealed from should be reversed.

Daniel Lord and F. N. Bangs, for the respondents.

The cause of action and the frame of the complaint, in each case, is based to a large extent on the idea that the defendants have been guilty of misrepresentations and fraud, by which the plaintiff has sustained injury ; in other words, the action is in the nature of an action on the case for deceit and conspiracy.

The complaint contains, in substance, every allegation necessary to sustain such an action.

I. The complaint states, and states sufficiently, a loss and injury to the plaintiff. The loss consisted in his parting with money for that which was in fact worthless and of no value. He paid \$3500 as the intrinsic value of an interest of a precise and specified extent in a capital of an incorporated company. The money so paid was lost to him, because the interest supposed to be purchased had no intrinsic value, or, if it existed at all, had never existed to the extent specified. This is a sufficient allegation of loss or damage. (See *Pontifex v. Bignold*, 3 Manning & Granger, 63.)

II. The means by which he was induced to make this purchase were affirmations and assertions made by the defendants respecting, not the value of the property purchased, but a fact upon which its value depended, viz.: its productiveness. The defendants declared, and published to the community at large, that the capital in which an interest was purchased by the plaintiff, had actually produced an income at different times and to different amounts. That these affirmations operated on the plaintiff's mind

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as an inducement to his making the purchase, is stated. That they were false, is stated.

III. The complaint sufficiently connects the injury sustained by the plaintiff with the acts of the defendants, when it states, that the acts of the defendants were committed with a fraudulent intent, and induced the plaintiff to do that which was prejudicial to himself.

Whether they were actually intended to produce that effect on him in particular, is not material. It is sufficient if there is an intention to defraud, without any selection in the mind of the author of the fraud of any particular victim, or if, intending to injure one, he defrauds another. (*Williams v. Wood*, 14 Wendell, 130; *Addington v. Allen*, 11 Wendell, 374.) The complaint sufficiently alleges a fraudulent intent. It alleges, that they intended to get the public at large to believe various things which were not true—to give a false credit to the certificates which they issued. Then they intended to deceive; for deception consists in inducing an erroneous belief or opinion in respect to a matter of fact. And defrauding, in a legal sense, is inducing another to act to his own prejudice by means of deceptive acts, the benefit of the deceiver not being essential to the idea of defrauding. (*Merritt v. White*, 8 Selden, 355.) And as to the technical form of averring such an intent, see *Zabriskie v. Smith*, (3 Kernan, 322.) Knowledge of the falsity of the various acts of fraud and untruth is averred.

IV. In the present case, the acts charged upon the defendants are, that they created a certain species of property designed to become, and elaborately adapted by them to become, articles of traffic and objects of investment, viz.: transferable shares in the capital stock of an incorporated company. That they communicated to agents, selected by themselves, viz. the public newspapers, for the purpose of being further disseminated to the public, information, which it was plain to them, and is obvious to the Court, must have operated to create an erroneous opinion, or belief, or impression respecting the value and advantages of that species of property, and which was so intended. It is to be observed that they were not fulfilling any duty to any particular class of persons, or any duty which they owed to the community at large, in giving this information. It was a matter of choice to do it or not. It is, therefore, to be discriminated from a case arising on a contract, or

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a private or particular duty, where, it may be conceded, the remedy would be confined to the very party in whose favor the contract is to be performed, or the duty discharged. It is the naked case of a fraudulent act, in its tendency injurious to an indefinite number of persons, or to some indefinite person, out of a large number, done voluntarily without any obligation to make any statement, or do any act in relation to the subject of the statement made or the thing done. The defendants were not bound to communicate to the public any information on the subject in question; but if they assumed to do it, they were bound to do it honestly, and the violation of that duty was a wrong to all deceived by it. This is not a new idea. At common law, the circulation of a false report, likely to enhance the value of public stock, was an indictable offence. (*Rex v. De Beranger*, 3 Maule & Selwyn, 67.) And it is an indictable offence under our Revised Statutes. (R. S. Part 4, chap. 1, title 4, § 8.)

V. If an act of fraud, committed with an intention to deceive, or committed under circumstances where it must necessarily and certainly produce deception, and followed in the ordinary and foreknown course of events, by pecuniary damage to a stranger, is not a ground of action, then it is singularly discriminated from cases of negligence, violence, and even from that which, but for its consequences, would be innocence itself—all which are punished when, and because, they inflict injury upon a party standing at a remote distance from the original wrongdoer, and connected with him only through the agency of other persons, who are the immediate instruments by which the injury is inflicted.

Such are the following cases:—

(*Thomas v. Winchester*, 2 Seld. 397.) This was a case of representations, made negligently, but not fraudulently. (It is stated, in this case, that one of the Judges concurred, on the ground that the act complained of was a misdemeanor by statute. But see the opinion of Ruggles, C. J., at p. 409. The judgment proceeded, not on the ground of the criminality of the act, but on the ground of its injurious tendency, and the probability of its leading to damage.) (*Scott v. Shepherd*, 2 Bl. 89; *Guille v. Swan*, 19 John. 381.) And that in respect to the range of responsibility, fraud stands upon the same footing as other wrongful acts. (*Lobdell v. Baker*, 1 Met. 193; *Benton v. Pratt*, 2 Wend. 385; *Addington*

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v. *Allen*, 11 Wend. 874; *Williams v. Wood*, 14 Wend. 130; *Gerhard v. Bates*, 20 Law & Eq. R. 129; *Taylor v. Ashton*, 11 Mees. & W. 601; *Mayne v. Griswold*, 8 Sandf. 474.)

If, in the present case, the representations complained of had been endorsed on the back of the certificates issued by the defendants, with the purpose and intent of enhancing their value, could it be doubted that the principles adjudged in *Thomas v. Winchester*, were strictly applicable? But the representations were addressed to the same community to whom the certificates were issued, and were reiterated with great frequency and boldness. They accompanied the certificates into the world, and characterized them while they remained there, and were intended to deceive every one who should see and act upon them.

VI. The plaintiff may be met with an argument founded, or supposed to be founded, on the case of the *Mechanics' Bank v. The New Haven Railroad Co.*, (3 Kern. 600.) It is not intended to insist upon a proposition at variance with this decision in any case to which it is applicable. It is not applicable to this. This is not an action against the corporation on any assumed contract. It is an action against individuals for a private injury, resulting from a public wrong. Grant that a certificate of stock is not negotiable in any such sense as that a purchaser has greater rights in the capital purporting to be represented than his vendor had; it does not follow that he has no rights against the parties who have induced him to make the purchase. Does it follow, from the failure of the bank to recover against the railroad company, that they could not have recovered against Schuyler or Kyle? Nor is it intended to insist upon any such doctrine as the learned counsel for the defendants may style "negotiable fraud." It is not contended that fraud is negotiable, or that a right of action for a fraud is merchandise. It is only insisted that a distinct cause of action arose in the plaintiff's favor when he was induced by false representations to affix an erroneous estimate of value to a species of property which the law authorized him to buy, and, in accordance with the intentions of the defendants, recognized as legitimate articles of trade and means for investment.

VII. If the foregoing considerations tend to sustain the order appealed from, then it derives additional support from other parts of the complaint, not yet adverted to. The complaint shows that

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the whole scheme of the defendants was a wrong, contrived to injure and defraud indefinitely, and that such was its consequence. 1. The original law under which the corporation was organized (Laws of 1848, c. 40, § 14) provided that nothing but money should be considered as payment of capital stock. The amendatory Act (Laws of 1853, chap. 383) authorized property other than money to be received as a contribution to the capital. 2. The defendants, knowing that their capital was to consist largely of property other than money, suppressed that fact in the public document by which they acquired their corporate character. They stated their capital as consisting of so much money. 3. Under the provisions of the statute, and the terms of the certificate filed, a certificate of stock issued by the defendants, was nothing less than a receipt for so much money. It was not a conveyance, nor an evidence of debt, but a muniment of title, a voucher issued for the purpose of representing the interest of the holder in the company's capital, and his right to a participation in its management and profits. It was literally the statement of a fact. 4. If the amount represented by the certificates actually exceeded the amount upon payment of which they were issued, then they were false representations in every legal and popular sense. 5. The legal right of the holder of a certificate as against the corporation and its property and profits depends, not on the terms of the certificate, but on the circumstances and consideration under and for which it was issued. (*Mechanics' Bank v. New Haven Railroad Co.*, 3 Kern. 600.) 6. A party contributing one dollar, a share being of the par value of two dollars, is not entitled to a certificate, nor an interest for one share, nor to participate to that extent in the company's property or profits, if other parties hold certificates for which there has been paid to the company more than one dollar per share. 7. The vendee of any such certificate, and of the interest which it purports to represent, would be deceived if, relying on the certificate, he were induced to believe that he would participate equally with all other parties in the company's property and profits. He would be defrauded if he were induced to pay money under the influence of such a belief. 8. If the certificate purchased by the plaintiff, and afterwards re-issued to him by defendants, was one of the certificates mentioned, as issued to Skiddy, Peters, etc., then the plaintiff did not acquire the interest repre-

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sented by the certificates, for the reason that he was not entitled to participate equally or proportionately with the parties to whom certificates were issued, which are alleged to have been issued to the defendants, if the latter certificates were properly issued. 9. If the latter certificates were not properly issued, and the plaintiff purchased one of them, then he was not entitled to participate equally or proportionately with the other class of stockholders. 10. If the certificate purchased by the plaintiff was the representative of an actual interest acquired by the payment of money, and the money so paid constituted the company's sole capital, then the issue of the certificates in payment for property, was an act of fraud tending to create an erroneous belief in the mind of the plaintiff respecting the nature, amount, and extent of the company's capital in which he was purchasing an interest. 11. We have then these elements in this case, without reference to the false declaration of dividends :—

A wrongful and fraudulent issue of false certificates for the purpose of public traffic and investment. A reliance by the plaintiff on the statements contained in those certificates, and the formation of an erroneous belief founded on those statements. The fact that the plaintiff did not acquire such an interest as the certificates falsely purported to represent, and such as he supposed he purchased. The fact that the interest purchased, and the certificate which represented it, was absolutely worthless. If it is asked in what its worthlessness, which is after all a negative quality, consisted, it may be answered, that it was worthless because the plaintiff could not honestly sell it, or because its want of value was ascertained by all who would otherwise be likely to purchase it, or because it only exposed the plaintiff to additional liabilities on the very ground that he was a stockholder. These are all items of damage, which the Court may judicially notice as implied in the term worthlessness. They are all matters of public law. (See General Manufacturing Law of 1848, § 10, 18; Laws of 1855, c. 298, p. 512.) It is submitted, that a sufficient cause of action exists.

VIII. It nowhere appears on the complaint, that the injuries alleged to have been sustained by the plaintiff, were common to every stockholder.

IX. There is no misjoinder of causes of action. The acts com-

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plained of were all similar in their character, committed by the same parties, and combined to cause the injury alleged.

X. If the recovery in this case were to subject the corporation to any payment, it would be entitled to be made a party. There is nothing in the case, however, rendering its presence as a party necessary.

BOSWORTH, J.—The gist of the complaint is, that the defendants, by the means detailed, were "fraudulently and illegally intending and contriving to dispose of the said property at a false and fictitious value, for their own benefit, as individuals, and to cause it to be generally believed, that the said company possessed capital, or had property to the amount of \$1,000,000 in all," "and that shares or interests in said capital were of great value, and a means of profitable traffic and of safe investment," and that "by means of the aforesaid false and fraudulent acts, practices, deceits, statements and representations of the said defendants, it had come to be generally believed in the City of New York, and was believed by the plaintiff, that the said Gold Hill Mining Company was, in fact, possessed of property of at least \$1,000,000 in value, and that shares and interests in such capital were of the value of at least \$5 per share, and that the said company had, since the organization thereof, earned over and above its expenses, at least, the sum of \$50,000," etc. . . . "and so believing, and on the faith and credit of the aforesaid false and fraudulent acts, practices, and representations of the said defendants, of the falsity and fraud whereof the said plaintiff was ignorant, the said plaintiff did on the aforesaid 14th of April, 1854," purchase certificates of said stock to the extent of 1000 shares, and paid \$3500 therefor, and the interest acquired by the plaintiff was worthless. "That by means of said false, fraudulent, and deceptive acts, practices, and representations of the said defendants, said plaintiff has sustained damage to the amount of \$6000, for which sum, with the costs of this action, he demands judgment."

It is an obvious principle, that a fraud practised by the defendants on the plaintiff and producing damage, will give to the plaintiff a right of action. This principle is not denied. But it is denied, that the allegations of fact, contained in the complaint, bring this case within its operation.

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It is, in substance, alleged, as we construe the complaint, that the defendants designed, by the fraudulent acts enumerated, to deceive the public generally, and induce a general belief that a purchase of the stock would be a safe investment, and that by such means they did fraudulently produce this general belief, and caused the plaintiff to believe it, and that, by these fraudulent acts, they induced the plaintiff to purchase.

There is, in substance, no difference between an averment, that by means of certain specified frauds of the defendants, the plaintiff was induced to and did purchase, and an averment that the defendants, by means of the same frauds, induced the plaintiff to buy the same stock.

In *Gerhard v. Bates*, (20 Eng. Law and Eq. R. 136, S. C. 2 Ellis & Bl. 476,) the averment, by which it was held that the wrong and the loss were concatenated as cause and effect, was in these words, viz.: "that the defendants, by means of the said false, fraudulent, and deceitful representations, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer of 2500 of the said 12,000 shares, at 12s. 6d. a share, etc."

It was not, in terms, alleged, that the defendant made any of the fraudulent representations to the plaintiff, directly, or had any communication with him, in respect to such purchase, before it was made.

We think, that an allegation that, "by means of the said false, fraudulent, and deceitful representations of the said defendants, the plaintiff was wrongfully and fraudulently induced to become the purchaser and bearer of 2500 of the said 12,000 shares, at 12s. 6d. a share, etc.," would not mean less, or be less effective on a general demurrer to a complaint or declaration, than an allegation in the form of that contained in the declaration in *Gerhard v. Bates*.

The complaint before us is, that the defendants practised certain frauds to induce the public generally to believe certain things, that by means of these frauds of the defendants, the public generally, and the plaintiff in particular, did believe these things; and that so believing and relying on these things being as the defendants had fraudulently represented, and because they had represented them to be so, the plaintiff bought, and that by

means of these frauds of the defendants, the plaintiff has sustained damage.

This, as it seems to us, is saying that the defendants, by the frauds enumerated, have fraudulently induced the plaintiff to purchase stock, and that by such fraud they have subjected him to damage.

The complaint details the artifices employed to deceive, and connects the fraud of the defendants and the damage to the plaintiff, as cause and effect.

Although the Code does not give a right of action upon any given state of facts which would not create one before it was enacted, still no artificial or technical phraseology need be employed in stating the facts claimed to constitute a cause of action. There are now no rules by which the sufficiency of a pleading is to be determined, except those presented by the Code itself, § 140. A complaint, to be sufficient, must contain a concise statement of facts, constituting a cause of action, § 142. Whether those stated constitute one, is to be determined by applying to them established principles of law. In construing a pleading, for the purpose of determining its effect, its allegations must be liberally, and not technically, construed, and must be construed with a view to substantial justice between the parties, § 159.

The publicly advertised fact, repeated from time to time, that the shareholders were entitled to dividends of money out of the profits of the said company's business, and some other acts enumerated in the complaint, as having been done by the defendants, were continuing representations to the public, and amounted to representations to any and every person, who might be thereby induced to purchase shares, if so advertised with intent to deceive and defraud the public generally.

When a bubble company is formed with the fraudulent intent of its managers, to induce a general belief that its stock is of, at least, its par value, and that, in prosecuting the business for which it was professedly organized, it is making money, and so much money as to enable the shareholders to declare successive dividends out of the profits every two months, and this fraud is practised to give to the stock a market value, and to induce the public generally to seek it and purchase it as an investment—and the fraud is successful, and produces the results contemplated and in-

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tended; every person who, by means of such frauds, is induced to purchase, and is thereby subjected to a loss, is defrauded by such managers and by their fraudulent acts. Such are admitted, by the demurrer, to be the facts of the case; whether the plaintiff could establish them, if the allegations of the complaint were put at issue, is not a question before us. The privity between the managers and every such purchaser is, in such a case, in judgment of law, as actual and as direct, as between a person giving, fraudulently, a general recommendation of the trustworthiness of a particular person, and the individual to whom it may be shown, relying on its truth, may give credit to the person so recommended, and be defrauded and injured thereby.

In the case last supposed, there can be no doubt of the liability of the person fraudulently recommending the one who obtained credit.

It is urged, that the Squib case, *Scott v. Shepherd*, (2 Wm. Bl. 892,) and the case of the loaded gun placed in the hands of a young and inexperienced girl, (*Dixon v. Bell*, 5 M. and S. 198,) and the case of labelling poisonous drugs with the name of a harmless medicine, (*Thomas v. Winchester*, 2 Seld. 411,) and some others, cited on the argument, are exemplifications of the rule, that liability attaches to him who, having the control of a destructive physical agent, either mischievously or by neglect, places or leaves it in such a condition, that, in the usual and natural course of things, its action may work an injury to others, and injury, in fact, ensues to their persons or property. In those cases, it is true, the physical agent acted directly upon the person or property of another, and produced injury. But, in giving existence to the immediate action which caused the injury, the person, held liable, did not participate. All he did was complete, before such immediate action commenced; and in some of the cases, an interval occurred after his direct action, and its effects were at an end, before the action of others, which directly produced the injury, was commenced.

In the present case, although there is no physical agent which has directly injured the plaintiff by its action, yet the means, charged to have been employed by the defendants to defraud, are alleged to have been designed to be, and were, as it is averred, continually exerting an influence upon those whom they were intended

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to deceive; and their persuasive power to defraud continued to operate, until they had resulted in fraudulently inducing the plaintiff to buy the stock, and part with his money.

The defendants, according to the allegations of the complaint, employed these frauds to produce this result—a result anticipated, according to the usual and natural course of things, if the frauds should not be detected before their natural and intended effects had been realized.

Some of the alleged acts of fraud are stated to have been performed before the company was organized, and, as to two of the defendants, it is not charged that they originally participated in them; but it is averred, that all the defendants, after all of them co-operated in the frauds stated to have been subsequently practiced, did so "well knowing the premises;" and, of course, continued the use of the means previously perfected, as part of the scheme to deceive, with a knowledge of their fraudulent character, and with a view to defraud the public generally.

We admit that it cannot be law, that a person who deceives A by some instrument, and by it intends to deceive only him, can be made liable to every person who is injured from dealing with A, by being misled by the instrument which deceived A, and was made to deceive him alone.

But, when an instrument is made to deceive the public generally, and is adapted, as well as intended, to deceive some portion of the public, and as well one person as another, and is used as it was designed it should be, and fraudulently induces some one to act to his prejudice, by acting in the mode it was intended to influence them to act who might be deceived by it; the person who made the instrument, and caused it to be thus fraudulently used, is liable to the person who has been defrauded by it. In such a case, the person injured has been subjected to damage by his fraudulent acts, and the fraudulent wrong-doer is liable for the consequences.

We concede that, in order to make the defendants liable to the plaintiffs, enough must be stated in the complaint to show that the defendants caused the damage to the plaintiff of which he complains. If enough is not stated to amount, in substance, to that, the complaint does not contain facts sufficient to constitute a cause of action. But, in the view which we take of the allegations

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of the complaint, the wrong and the loss are set forth as cause and effect; and it is sufficiently alleged, in substance, that the defendants practiced the frauds complained of, and, by their frauds, induced the plaintiff to purchase the shares in question.

What evidence the plaintiff must give to establish the case made by the complaint, on its material allegations being put at issue, is not a question before us.

We do not intend to intimate any opinion upon that point, nor upon the effect, as evidence, of any of the documents set forth in the complaint, in support of such issues; but affirm the order appealed from, on the ground, that, assuming all the allegations stated in the complaint to be true, it is alleged, in substance, that the defendants have fraudulently induced the plaintiff to purchase 1000 shares of the stock in question to his damage; for the recovery of which damage, this action is brought.

I understand that all the Judges who heard the argument, concur with me in affirming the order, solely on this ground, except my brother Hoffman, who has considered some additional propositions, and has stated, in the elaborate opinion he has prepared, the conclusions at which he has arrived.

In *Ward v. Sackett, et al.*, the order appealed from must be affirmed, on the same grounds as that in *Cross v. Sackett, et al.*

HOFFMAN, J.—(The opinion, which is reported entire in Abb. Pr. R. vol. 6, p. 259, after stating, summarily, the allegations of the complaint, reads as follows, viz.)—My first subject of inquiry shall be, What did the certificates, issued by the defendants in their corporate name, purport to represent? what, under the statute of organization, ought they by law to have represented? and what was the truth in relation to such representations?

The representation on the certificate, with its attendant power, was, that the party named in it was entitled to an interest, proportionate to the whole stock, in a money capital, or in property equivalent substantially to a money capital, of one million of dollars. This is the statement made and uttered by the defendants with an implied engagement for its truth upon these instruments.

And this is precisely what, under their charter, they were allowed and directed to represent; and they could only comply with

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the acts of the legislature, when such was the representation, and when it was true.

Section 14 of the Act of 1848, (Laws of 1848, '54, § 14) declared, that "nothing but money should be considered as payment of any part of the capital stock." The act of 1853, (Laws of 1853, 705,) provided "that the trustees may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be taken as full stock." It is to be reported, not as cash paid into the company, but according to the fact.

We accede to the proposition of the counsel of the plaintiff, that the legislature, in substituting mines and other property for the money capital before prescribed, intended and declared, that such property should have an actual value reasonably proportionate to the stock issued to pay for it. Nothing else is consistent with the honest purposes of such an association, and nothing else can have been the legislative will.

But what did these certificates, in truth, represent? What, for example, was the fact, as the complaint states it, as to the certificate for 1000 shares, purchased by the plaintiff? Instead of an interest in \$5000 of money once contributed and presumed to exist in some form of value, or in mines and property of an equal or substantially equal value, he got what he alleges to be wholly worthless, and which, upon any calculation upon the statements made, must be of greatly inferior value.

We are bound to assume the allegations of this complaint to be true, in all their reasonable and legal import; and if so, a case is presented of the formation of a bubble company, contrived for purposes of private emolument, its authors and managers fraudulently publishing statements tending to produce the belief that the stock was, at least, of its par value; that its business had warranted successive dividends from profits; that these false and deceptive representations were made by the defendants, the authors or managers of the scheme; that they were in such an apparent form of negotiability, as, from the custom of business, was peculiarly calculated to delude and to injure; and that a delusion and injury has actually been produced, and fallen upon the plaintiff, in consequence of such acts.

We may here observe, that some of the acts of fraud are stated

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to have been performed before the company was organized; and as to two of the defendants, it is not said that they originally participated in them. But as to the frauds stated to have been subsequently practised, it is averred that all the defendants acted together, and did so, well knowing the premises. This is sufficient to render them responsible by the adoption, as the others are by their performance, of the acts.

The learned counsel of the defendants has pressed upon us the proposition, that such a suit as this has been unknown through all periods of the law, except when it was warranted by the statute of Geo. I. (cap. 18, § 20, 1719), consequent upon the South Sea Bubble. He insists "that because the common law afforded no remedy to the remote purchaser, this statute was passed, giving in the 20th section an action for damages."

He has called our attention to the history of those gigantic frauds, which have acquired an immortality of pre-eminence among the destructive projects of the visionary or the designing, the Mississippi and South Sea schemes. A member of Parliament, when the Act of Geo. I. was discussed, admitted "that the directors could not be reached by any known law; but, he said, extraordinary crimes call for extraordinary remedies. The Roman lawgivers had not foreseen the possibility of a parricide; but as soon as the first monster appeared, they found a law. The sack and the Tiber was his doom." (Lord Mahon's History, vol. i. 280.)

But I cannot believe, that either the argument of the learned counsel, or the declamation of the rhetorician of the House of Commons, is sufficient to stamp the law of England with the impotency attributed to it. I consider that there have always been principles of law, and tribunals adapted and competent, to redress wrongs of this nature.

The Act of Geo. I. was annulled in the 6th year of Geo. IV. (1825.) The 19th, 20th, and 21st sections were recited and repealed, with this declaration: "And whereas it is expedient that so much of the above act as is above set forth should be repealed, and that the said undertakings, attempts, practices, and acts should be adjudged and dealt with according to the common law, notwithstanding such act. Therefore, etc."

We may assume that the Parliament thought there was some mode of dealing with such fraudulent practices as the 20th sec-

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tion of the Act had aimed at, according to the doctrines of the common law, and through some of the methods of redress it had supplied.

In *The Charitable Corporation v. Sutton*, (2 Atk. 401, 1742,) Lord Hardwicke announced as an unquestionable principle, that a court of chancery could give relief against all who are constituted expressly, or by operation of law, trustees or agents, to parties injured by their acts. It is true, the corporation itself there sued the managers for a defalcation.

In the case of *Hayes v. Morgan*, (April, 1857,) I had occasion to consider the following authorities:—(*Hitchens v. Congreve*, 4 Russ. 562; *Walburn v. Ingilby*, 1 Mylne & K. 61; *Foss v. Harbottle*, 2 Hare, 461; *Dodge v. Woolsey*, 18 How. U. S. R. 83; *Benson v. Heathcum*, 1 Y. & Coll. Ch. Cas. 326; and *Robinson v. Smith*, 3 Paige, 222.)

The law which may be gathered from these cases is, that there is no wrong or fraud, which directors of a joint-stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies. The first mode is, when the company, in its corporate name, seeks to set aside the fraud, to reclaim abstracted property, or prevent a corporate loss. Such was the case of the *Corporation v. Sutton*, and the rule in *Foss v. Harbottle*. The next mode is, when shareholders bring an action for the same object, unitedly, or in the form which the Court of Chancery permits, of a bill by one or more on behalf of themselves and all others, having a common interest. This right exists under various circumstances. It clearly exists when the directors or agents, whose deeds or omissions are impeached, do themselves control the company, and impede the assertion of a right in its own name. (*Morley v. Alston*, 1 Phill. Ch. R. 790.)

I may particularly notice the case of *Walburn v. Ingilby*. It was against directors of an unincorporated joint-stock company by a holder of shares. The company was for working mines in Peru. The advertisement was of a capital of £1,000,000 in 20,000 shares of £50 each. The defendants were the original directors, and still continue to be such. The bill stated various acts by which the property of the company was abstracted and appropriated to the defendants. It also set forth that the plaintiff purchased, at various times from different persons, 2000 shares, and

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was the holder thereof. The bill was sustained in every point raised against it, except for not stating the manner in which the plaintiff had acquired title to shares purchased from others. The bill showed that no transfer was valid without the approval of the board. This was held to be a condition precedent and to be stated. It was framed to get back money for the general fund.

But another question, and closer to the present, arises when an individual claims redress in his own name, and solely on his own account, for a fraud practised by a trustee or director of an association from which he has suffered loss; when, although his claim is founded precisely upon the same facts and relations as many others, yet, as his injury and loss is disconnected and peculiar, he seeks to assert his right alone.

The old case of *Coll v. Woollaston*, (2 P. Wms. 154,) is an example of this character. The plaintiff sought by his bill to be repaid two sums of money advanced to the defendants as managers and projectors of a bubble called The Land Security and Oil Patent, for the purpose of extracting oil out of radishes. There were two plaintiffs, and they purchased six shares each. The company was to have a capital of £100,000. The shares to be 5000, at £20 each. Woollaston bought an estate for £31,800, which was under mortgage for £28,000, and he was to be paid £57,200 out of the fund. It was represented by the defendants to be a most advantageous project. The Master of the Rolls said:—"This is an imposition, to propose the surplus of the value of an estate (which cost but £31,800), after £85,000 charged upon it—more than double its value—as a security to the contributors who laid out their money upon this project; it is giving them moonshine instead of any thing real."

"It is no objection that the parties have their remedy at law, and may bring an action for money had and received; for in case of fraud, a court of equity has a concurrent jurisdiction with a court of law." The decree was for payment of the money paid, interest, and costs.

In *Green v. Barrett*, (1 Sim. 45,) the plaintiff was a shareholder, and the defendants were directors of a company, called the Imperial Distillery Company. His bill was to recover a deposit of £100, which he had paid upon twenty shares allotted to him. His communications were with the secretary and bankers of the

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company. But a circular or prospectus had been issued by the directors, on which he much relied. The nature of the bill is thus stated by the vice-chancellor:—"The prospectus of this undertaking was published, not with any intention to establish a company on the principles there stated, but as a snare to persons who might unwarily become subscribers, and for the purpose of enabling the directors to make a profit by the sale of shares which they thought fit to assume to themselves. It appears to me the case is governed by that of *Colt v. Woollaston*, and upon that authority I overrule the demurrer."

In *Jones v. Garcia Del Rio*, (1 Turner & R. 297), where the bill proceeded upon similar grounds of fraud, three persons filed it as shareholders, on behalf of themselves and others, to have their subscriptions returned. The case came up on an injunction, and a motion to dissolve it after answer. The answer set up that many of the shareholders, who were in the same situation as the plaintiffs, were content to abide by the contracts.

The lord-chancellor said, that the plaintiffs, if they had any demand at all, had each a demand at law, and each a several demand in equity; that they could not file a bill in behalf of themselves and the other holders of scrip: as they were unable to do that, they could not, having three distinct demands, file one bill.

In *Blain v. Agar*, (1 Sim. 37; 2 id. 289,) the bill was by five persons, on behalf of themselves and numerous other parties to an indenture, by which a large number of shares had been assigned to the five. It was in trust, with a power of attorney to sue, obviously to avoid the difficulty of making all parties. The allegations were of a deceptive prospectus, caused to be printed and published by the directors, and other acts of fraud, in misapplying the deposit money, etc. The bill also showed that some of the original shareholders had transferred their shares to others; and some of the former, with the latter, united in the assignment to the plaintiffs.

The vice-chancellor overruled a demurrer for want of equity, but sustained one *ore tenus* for want of parties, holding that the assignors must be on the record.

The bill was then amended, and the assignment was left out, and naming three other shareholders as parties, stating that they

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It is, in substance, alleged, as we construe the complaint, that the defendants designed, by the fraudulent acts enumerated, to deceive the public generally, and induce a general belief that a purchase of the stock would be a safe investment, and that by such means they did fraudulently produce this general belief, and caused the plaintiff to believe it, and that, by these fraudulent acts, they induced the plaintiff to purchase.

There is, in substance, no difference between an averment, that by means of certain specified frauds of the defendants, the plaintiff was induced to and did purchase, and an averment that the defendants, by means of the same frauds, induced the plaintiff to buy the same stock.

In *Gerhard v. Bates*, (20 Eng. Law and Eq. R. 136, S. C. 2 Ellis & Bl. 476,) the averment, by which it was held that the wrong and the loss were concatenated as cause and effect, was in these words, viz.: "that the defendants, by means of the said false, fraudulent, and deceitful representations, wrongfully and fraudulently induced the plaintiff to become the purchaser and bearer of 2500 of the said 12,000 shares, at 12s. 6d. a share, etc."

It was not, in terms, alleged, that the defendant made any of the fraudulent representations to the plaintiff, directly, or had any communication with him, in respect to such purchase, before it was made.

We think, that an allegation that, "by means of the said false, fraudulent, and deceitful representations of the said defendants, the plaintiff was wrongfully and fraudulently induced to become the purchaser and bearer of 2500 of the said 12,000 shares, at 12s. 6d. a share, etc." would not mean less, or be less effective on a general demurrer to a complaint or declaration, than an allegation in the form of that contained in the declaration in *Gerhard v. Bates*.

The complaint before us is, that the defendants practised certain frauds to induce the public generally to believe certain things, that by means of these frauds of the defendants, the public generally, and the plaintiff in particular, did believe these things; and that so believing and relying on these things being as the defendants had fraudulently represented, and because they had represented them to be so, the plaintiff bought, and that by

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means of these frauds of the defendants, the plaintiff has sustained damage.

This, as it seems to us, is saying that the defendants, by the frauds enumerated, have fraudulently induced the plaintiff to purchase stock, and that by such fraud they have subjected him to damage.

The complaint details the artifices employed to deceive, and connects the fraud of the defendants and the damage to the plaintiff, as cause and effect.

Although the Code does not give a right of action upon any given state of facts which would not create one before it was enacted, still no artificial or technical phraseology need be employed in stating the facts claimed to constitute a cause of action. There are now no rules by which the sufficiency of a pleading is to be determined, except those presented by the Code itself, § 140. A complaint, to be sufficient, must contain a concise statement of facts, constituting a cause of action, § 142. Whether those stated constitute one, is to be determined by applying to them established principles of law. In construing a pleading, for the purpose of determining its effect, its allegations must be liberally, and not technically, construed, and must be construed with a view to substantial justice between the parties, § 159.

The publicly advertised fact, repeated from time to time, that the shareholders were entitled to dividends of money out of the profits of the said company's business, and some other acts enumerated in the complaint, as having been done by the defendants, were continuing representations to the public, and amounted to representations to any and every person, who might be thereby induced to purchase shares, if so advertised with intent to deceive and defraud the public generally.

When a bubble company is formed with the fraudulent intent of its managers, to induce a general belief that its stock is of, at least, its par value, and that, in prosecuting the business for which it was professedly organized, it is making money, and so much money as to enable the shareholders to declare successive dividends out of the profits every two months, and this fraud is practised to give to the stock a market value, and to induce the public generally to seek it and purchase it as an investment—and the fraud is successful, and produces the results contemplated and in-

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by the defendant, inducing the plaintiff to purchase, and being false and fraudulent, was enough.

In the course of the argument, Justice Coleridge said:—"It is a continuing representation to the public, and amounts to a representation to whomsoever shall hold shares."

See, also, *The National Exchange Company v. Drew*, in the House of Lords, (32 Eng. L. & Eq. 10.)

The proposition of the defendant's counsel, that the action can only exist, if at all, in favor of one to whom the false and fraudulent statement has been directly made, and his reasoning to support it, is similar to that of Justice Selden, in the *Farmers' and Mechanics' Bank v. The Butchers' and Drovers' Bank*, (Court of Appeals, December, 1857.*). He cites the cases of *Grant v. Norway*, (10 Com. B. R. 865;) *Coleman v. Riches*, (29 Eng. L. & Eq. 328,) and *The Mechanics' Bank v. The New York and New Haven Railroad Co.*, (3 Kern. 599.) He says: "they are plainly distinguishable from the case before the Court. In neither of these cases was the document upon which the question arose, negotiable. It was sought there to make the principal responsible for a false representation of the agent—not responsible to the person to whom the representation was made, but to one with whom the agent had no dealings, and to whom he had made no representation."

But a great distinction exists between the present case and that of the New Haven Railroad Company, or that of the Farmers' and Mechanics' Bank, connected with the question of a transferred responsibility. In each of these cases the directors of the companies were wholly innocent; they were themselves the victims of a misplaced confidence. But here the instrument sent forth by the directors is framed by themselves: if it was false, the falsehood is their own, and the imposition it produces must be treated as the result of their own deceptive practices.

Grant v. Norway, commented upon by the learned Justice, is fully stated by Justice Bosworth and Justice Comstock, in the New Haven R. R. case. There, the immediate holder of a bill of lading had no right of action, the goods not being put on board the vessel. The master, as agent of the owners, had not conferred any right of action upon the party to whom he gave the false bill of lading.

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So, in *Coleman v. Riches*, (29 Eng. L. and Eq. 323,) the false receipt was given by Bond, the agent of the defendant, to Lewis, and Lewis obtained money on it from the plaintiff. It was a receipt given by the keeper of the defendant's wharf, when the goods had not been received; and the plaintiff was defeated.

It is true Williams, Justice, said: Suppose Riches himself had given the fraudulent receipt, would that have constituted a representation by Riches to Coleman?

This seems to me the nearest approach to the proposition, that the false representation of the principal himself to one party who could support an action, is unavailing in favor of another to whom that party has transferred fully the subject-matter of the action, in respect to which the representation was made.

But, as I understand the opinion of the Court, this suggestion is contradicted. The Court say: There was no evidence from which it could be inferred, as between Coleman and Riches, (plaintiff and defendant,) that Riches agreed to give the vendee of corn vouchers of the delivery on which the vendee should act. Had there been such an agreement, it would have made the case very different, because Riches then would have undertaken to deliver vouchers to Coleman, and to employ proper persons to give such vouchers to him. But there is no evidence of any thing of the kind.

At any rate, I have come to the conclusion, that when a party projects and publicly promulgates the scheme of a joint-stock company; when he causes the usual books to be opened, and allows or causes the inscription of a person as an owner of an interest to a definite amount and value therein which is false within his own knowledge; when he embodies such false statements in a certificate of this right, directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power, authorizing a transfer at large, by the party to whom he has given the certificate; when that representation induces an innocent person to advance his money: the defendant's own individual act has created the privity of contract which the cases referred to appear to demand, and he must be held responsible to any one who has been deceived.

The representation was publicly addressed by the defendants to all; was intended to influence all who should become apprised of

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it; did exercise an influence upon the plaintiff, one of the mass addressed: that influence has resulted in his damage; and the fact embodied in the representation must be treated, for the present, as untrue, and as meant to deceive.

We all agree that the order should be affirmed, with costs.
Order affirmed accordingly.

CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS,
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.

ALBERT STORER AND EBEN S. STEPHENSON, Plaintiffs and Appellants, v. CHARLES S. COE, Defendant and Respondent.

1. On a bill filed to recover back securities pledged for alleged usurious loans, if all the equities alleged in the bill are fully met and denied by the answer, and the defendant is fully solvent and of sufficient responsibility to answer to all claims the plaintiffs may establish, an injunction granted, *ex parte*, to restrain the collection or disposition of the securities, should be wholly dissolved.
2. But the answer is not necessarily to be taken to meet and overcome the allegations in the complaint, merely because it is couched in such terms of denial and explanation of apparently usurious transactions, as if true in their proper and just meaning would show that there was no usury. When the denials and explanations are themselves such as to leave great suspicion that they are untrue or evasive, or, that under cover of words describing commissions and payment for services, usurious exactations have been made by the defendant, the injunction should be continued to the hearing.
3. A voluntary payment of a mere gratuity by the borrower to the lender, on the return of a sum of money legally loaned, does not necessarily make the next loan between the same parties usurious, nor raise a presumption that it is so. But a long series of successive loans running through a period of fifteen months or upwards, and an invariable payment of large premiums on the return of the money or renewal of the period of credit, is so suspicious as to raise a presumption, that both parties understood that the payment of an exorbitant sum was the condition of the successive loans.
4. The statement in the answer, that large premiums which were paid to the defendant, were for "extra trouble," either in lending the defendant's own money, or in buying the borrowers' note, is of no weight in rebutting the charge of

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- usury, unless the answer shows the particulars so as to exhibit an actual and *bona fide* sacrifice of time, money, or property, for the borrower's benefit.
5. It is competent to show, that an assignment of judgments against third parties, made by the borrower to the lender, was made and received as security for loans, although such assignment is absolute in form. And the truth of allegations in the answer of the defendant, that such assignment was absolute in fact, and on a purchase of the judgments, will be discredited where the whole transaction is such as to render that statement highly improbable.
 6. Where it is manifest that the plaintiffs may suffer loss by permitting the defendant to collect the moneys due upon securities held for loans, which are alleged to be usurious, the Court, if they deem the answer insufficient to overcome the equities in the complaint, should restrain such collection, although it may appear that the money, if collected, would be entirely safe in the hands of the defendant.

(Before DUKE, Ch. J., BOSWORTH, HOFFMAN, SLOSON and WOODRUFF, J. J.)
Heard, October, ; decided, October 31st, 1857.

THIS case came before the Court, in General Term, on appeal from an order modifying an injunction.

The plaintiffs filed their complaint, alleging, that from the month of November, 1855, to December, 1856, they had been in the constant habit of borrowing sums of money from the defendant, such loans, or extensions of some of them, taking place in every month, and that each and every of the said loans were made upon usury, and that the defendant, on the 11th of December, 1856, claimed a balance upon one of such usurious loans of \$14,200, and held the plaintiff's note for that amount, and claimed a balance of \$4000 upon another usurious loan, and that he held various bonds and stocks as collateral security.

The complaint then alleges, that the defendant lent them some further sums upon usury, and received an assignment of certain two judgments belonging to the plaintiffs, against The High Shoals Mining Company; one for \$6166.70, and the other \$21,045.02; as collateral security. That the plaintiffs are stockholders in the said company, and largely interested to sustain it and prevent a sacrifice of its property by a forced sale, or violent and speedy enforcement of the judgments.

It then further alleges subsequent payments to the defendant on account, the giving of notes in renewal, exorbitant charges by the defendant under the name of commissions, or for "extra trouble;" that all the loans for which the said collateral securities were spe-

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cifically pledged, have been repaid with the usurious interest there on; that the plaintiffs have demanded a return of the various securities, but defendant refuses to return them, and has offered them, together with the said judgments, for sale; and that he claims that he has purchased the judgments, and holds them by an absolute transfer, and threatens to proceed to collect them without delay, or sell them as he shall find for his interest.

The complaint prays for a surrender of the usurious notes made by the plaintiffs—a return of the bonds and stocks, and an assignment of the judgments against the High Shoals Mining Company, held by the defendant as security, as above stated. And prays, also, an injunction to restrain the defendant from selling, assigning, or in any manner disposing of the notes, judgments, bonds, stocks, etc., and from collecting the judgments, and for a receiver.

A temporary injunction, or order, in the nature of an injunction, was granted, *ex parte*, according to the prayer of the complaint, which, upon the coming in of the answer, and a hearing of the parties, was modified so as to permit the defendant to proceed to collect and enforce the said judgments.

The opinion of the Court states, with sufficient particularity, the substance of the answer bearing upon the question, whether the injunction should have been continued.

The plaintiffs appealed from the order, in so far as it modified the previous injunction.

H. A. Cram, for the plaintiffs, appellants, insisted that the equity of the case made by the complaint, was not met by the defendant's answer, and that the injunction should have been continued in full force.

That to suffer the defendant to collect or enforce the judgments, would be destructive of the company and its property, destroy all hope of the ultimate collection of the judgments in full, injure the plaintiffs as large stockholders, and, as alleged, leave them, also, personally liable for the debts of such company.

Hoffman and Pirsson for the defendant insisted that the whole equity of the complaint was denied by the answer, and that the injunction should have been wholly dissolved.

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BY THE COURT. WOODRUFF, J.—The complaint in this case shows, we think, a very clear case for relief, and entitling the plaintiffs to the interposition of the Court, to restrain the defendant from using the securities in his hands, upon the ground that the transactions between him and the plaintiff are usurious and void. If the facts stated by the plaintiffs are true, the defendant's exactions were singularly exorbitant and oppressive.

This case, made by the complaint, the defendant seeks, by his answer, to rebut; and if he has fully met the charges of the plaintiffs, so that the case stands before us upon an equal balance of the evidence, or upon the oath of the plaintiffs, fully met, and opposed by the oath of the defendant, then we think the plaintiffs have no reason to complain of the modification of the injunction. Nor in such case, should we have deemed it erroneous to dissolve the injunction altogether, especially since there is no pretence in the complaint, that the defendant is insolvent, or not fully able to meet any responsibility the plaintiffs may be able to charge upon him by the final judgment, if rendered herein in their favor. The case, in this aspect, would stand upon the ground, that all the equities of the bill were fully met and denied by the answer, and by a defendant fully solvent, and of sufficient responsibility to answer to all claims the plaintiffs may establish.

It is, however, quite apparent, that the order appealed from did not proceed upon this ground; it contemplates the continued control of the Court over the securities in the defendant's hands *pendente lite*, while it permits him to proceed to collect the judgments which it is the purpose of the complaint to reach and recover back.

With the apparent conclusion of the Justice, at Special Term, that the answer does not fully meet and disprove the allegations of the complaint, we concur.

The fact of the payment of very large sums by the plaintiffs, in consideration of the moneys loaned, or as a compensation to the defendant for having furnished to them the money, is admitted. These sums very greatly exceed the legal rate of interest.

The explanation given by the defendant is, in respect to very many of the payments, that they were not made in pursuance of any agreement made at the time of the respective loans, nor at any time previous thereto; but were paid to the defendant by the

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plaintiffs, voluntarily, at the time of refunding the respective loans, as a mere gratuity for his extra trouble in procuring said loans.

In respect to others, the explanation is, that the premiums were paid voluntarily, as a mere gratuity, without suggesting that the idea of "extra trouble" entered into the consideration of the parties.

In respect to others, it is said that the premium was paid to the defendant upon his purchasing from the plaintiffs their own notes, as a commission for his "extra trouble" in procuring the money to enable himself to make such purchase.

We have, then, some fifty transactions, in which the plaintiffs were, in fact, borrowers, and the defendant, in substance, and in most cases in form, the lender, running through a period of about 15 months, in which very large premiums were confessedly paid by the plaintiffs, over and above legal interest.

We think it was the part of the defendant, if these transactions were susceptible of explanation, to have shown their legality by something more specific than the vague generalities by which the answer seeks to defend them.

It is true, that a voluntary payment of a mere gratuity by a borrower to the lender, on returning a sum legally borrowed, does not necessarily make the next loan between the same parties usurious, nor raise a presumption that it is so; but a long series of successive loans, and an invariable payment of large premiums on the return of the money, or renewal of the period of credit therefor, has, at least, a very suspicious appearance, which the suggestion of a gratuity does not remove. The reception of gratuities by the lender from the borrower, in such cases, may be adopting a legal term to express what both parties perfectly understand to be a most exorbitant exaction, and, in truth, a condition of the continuance of favors which succeed each other as fast as the "gratuity," so-called, is bestowed.

Such is, to our minds, upon a review of the complaint and answer, the nature of the transactions in question.

As to the idea, suggested in some cases, that the premium was for extra trouble, it must suffice to say, that if a lender may, in any case, charge more than legal interest for lending his own money, or for buying of the borrower the borrower's own note,

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(upon which question it is unnecessary to speak decisively here,) the lender must, at least, show the facts and circumstances with sufficient particularity to enable the Court to see that there was some just and reasonable ground for such a charge, and some actual trouble taken, or service rendered, or sacrifice made: else the Court will be left to the probable inference, that, under circumstances like the present, it was, in truth, a mere cover, called by the name of compensation for "extra trouble," when no actual service was in fact rendered.

It is safe to say, that if any such charge can be permitted in any case, it can only be on clear allegation and proof of the actual and *bona fide* sacrifice of time, money, or property, for the benefit of the borrower, or for his accommodation.

The answer does not, we think, satisfactorily show this.

Without discussing the other particulars further, enough has been said to indicate our view of the effect of the answer, in reference to the matters contained in the account annexed to the complaint.

In respect to the judgments assigned, or caused by the plaintiffs to be assigned, to the defendant, he insists that he holds them by absolute purchase, having only given to them the privilege of repurchasing them within a limited time.

If we were bound to take the language of the writings as conclusive, or the mere words of the defendant's answer, we must hold that the allegations in the bill, that the defendant took the assignments as security merely, were overcome. We do not so understand our duty. Parties seldom express in terms their design to secure to themselves an advantage, which they know to be illegal; and in weighing the proper effect of the answer, we may, and ought, to look at all the circumstances, and consider as well what is alleged and what is denied, as also what is probable.

The plaintiffs had long been borrowers from this defendant. They had been long and continuously paying him, for the loans received, large amounts exceeding legal interest. In this state of things, they were anxious to purchase a judgment from Mr. Hilton, amounting to \$6166.70, the immediate enforcement of which might operate greatly to their prejudice; they had negotiated a purchase, and had paid therefor all the purchase-money except \$2890.13. The defendant consented to advance this, and

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now claims that the real understanding was, that for so doing he was to be deemed an absolute purchaser, and entitled to collect and retain the whole sum of \$6166.70, although the plaintiffs themselves were, as stockholders, liable for the amount.

And further than this, the claim of the defendant is, that for advancing a further sum of \$2726.57, he was to be deemed an absolute purchaser of the plaintiffs' judgment for over \$21,000, (embracing the amount of the first judgment,) subject to no other condition than that the plaintiffs might become re-purchasers, by re-paying, within 30 days, the two sums of \$2890.13 and \$2726.57, and one of the before-mentioned usurious loans of \$4000, amounting to \$9616.70, together with a premium or profit thereon of over \$3500, for the favor thus extended to the plaintiffs.

The relation of the parties in the previous transactions, the known need of the plaintiffs, the significant fact, that the defendant treated the plaintiffs as debtors, by taking their note for the amount of the defendant's advances, with the premium aforesaid, seem to us to indicate that, in this transaction the plaintiffs were borrowers merely, with a degree of probability, at least, not sufficiently explained by the suggestion in the defendant's answer, that the note was taken as a memorandum, and not with intent to enforce it.

And this view is further supported, by the admitted fact, that when the thirty days expired, the plaintiffs, seeking a further extension for thirty days, were required to give their note for \$10,000, although they had paid \$7000, thus adding about \$4000 to the exorbitant premiums already reserved to the defendant. Indeed, it is apparent, that the defendant has been reimbursed all, and even more, than he has advanced upon the judgments, and yet holds the plaintiff's note for \$10,000, for which these extravagant premiums, to the extent of, at least, \$6000, constitute the consideration. The remaining \$4000 being alleged to be one of the previous loans, already above referred to, upon, or for which premiums were charged, exceeding the legal rate of interest.

We are not satisfied, that the account of the transaction, by the defendant, is so credible, that upon the mere answer, the injunction should be denied. By whatever name the parties may have, in form, denominated the transactions, they savor strongly of de-

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vices to secure to the defendant large premiums on what the parties, in fact, intended as loans of money.

Under these views, it is quite apparent, that the defendant's answer has not so fully met and answered the complaint, that the injunction should have been dissolved; and such, we think, must have been the view of the Court, at Special Term, in refusing to dissolve the injunction.

But the Court did modify the injunction, so far as to permit the defendant to proceed to collect and enforce the judgments. We think this modification was made without considering the peculiar relation of the plaintiffs to the company against whom the judgments were recovered; for it is, we think, clear, that, if the plaintiffs have made a case for an injunction, which is not overcome by the defendant, then the modification should no more have been made than a dissolution ordered, if it is apparent, that the modification will expose the plaintiffs to the very injury which it is the object of the action to prevent.

The judgments are recovered against the High Shoals Mining Company. That company is alleged to be under present embarrassments, which would force it into insolvency, and sacrifice its property, if the judgments should be immediately enforced against them, and as we can readily perceive, such enforcement might render the ultimate collection of the debts impracticable—at all events, the plaintiffs, if they establish their title to the relief sought, are most interested in that matter, and they desire that the judgments be not now enforced.

Again, the plaintiffs are large stockholders in that company, and are in that manner greatly interested in sustaining the company, and preventing a sacrifice of its property. In this view, they are largely interested in restraining the immediate enforcement of the judgments, and although, as between them and the company, or its other stockholders, they would have a right to enforce the judgments at once, the plaintiffs have, (if entitled to the relief sought,) a clear right to consider, and determine for themselves, how their interests, as creditors, can be best harmonized with their interests as stockholders, and manage and control the judgments accordingly.

But still further and more conclusively, it is alleged that the plaintiffs, as stockholders in the company, are liable for its debts.

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Under such a responsibility, the control of these judgments and the preservation of the company from final insolvency, may be of very great moment to the plaintiffs.

If it were a matter of indifference to the plaintiffs, whether the money was or was not immediately collected, or, if both plaintiffs and defendant were alike interested, that the money should be collected, if possible, from the judgment debtor, then there would be obvious propriety in suffering the judgments to be enforced, and the defendant not being insolvent, it would be proper to suffer him to proceed with the collection. But the considerations above suggested, show that protection of the interest of the plaintiffs will not be so attained—to permit the defendant to proceed, is to defeat one of the principal objects of the action.

We conclude, therefore, that the order modifying the injunction should be reversed, and the injunction be reinstated.

The costs of this appeal must abide the event of the suit.

**JOSE M. MORA, and another, Appellants, v. DENNIS A. McCREDY,
and another, Respondents.**

1. An order, requiring the plaintiff to produce, or give copies of, papers, to enable the defendant to answer the complaint, will not be made when it is manifest that the defendant has no defence, which he cannot set up in due legal form, to raise the proper issues, without the aid of such papers.
2. Discovery may be ordered, to assist the defendant to facts, without which he cannot frame an answer which will protect his rights in the action itself; but the object for which discovery will be ordered, is not to prevent a defendant from answering untruthfully.
3. It may be very much desired by a defendant to know, before he answers, what facts the plaintiff may be able to prove, and what admissions or evidence, statements and accounts rendered by him to the plaintiff may contain; and such knowledge might, perhaps, serve as a useful precaution, admonishing the defendant what he may not, with safety to his reputation, aver or deny; but such considerations are no reasons for compelling a discovery, to enable the defendant to answer.

(Before BOSWORTH, HOFFMAN, SLOSSON, WOODKUFF, and PARKER, J. J.)
Heard, Jan. 16th; decided, Jan. 25th, 1868.

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THIS was an appeal, by the plaintiffs, from an order, requiring the plaintiffs to produce accounts and papers, to enable the defendants to prepare their answer to the plaintiffs' complaint.

The allegations on behalf of the defendants, upon which their application for a discovery was made, were, in substance, that the action was brought to recover from the defendants the sum of \$4719.54, which they had received for the plaintiffs, the same being the proceeds of notes which the defendants, as brokers, had sold or negotiated for the plaintiffs, the sum claimed being a balance, after a long series of heavy transactions, running through a period of several months.

The defendants allege that this balance, so claimed by the plaintiffs, is retained by them, and is due to them, as and for commissions on their transactions, as brokers for the plaintiffs, and for their services therein.

The plaintiffs deny the legality of such retention of the money; say this sum is over and above the defendants' proper commissions, and is now set up without truth, and without any just cause; and they say that this same claim, now made, was once before made, and the same sum was once charged in the account rendered by the defendants in the progress of the dealings, but was, on objection by the plaintiffs, struck out and abandoned, and the defendants' account settled on a waiver of any such claim; and that the dealings of the parties thereafter continued, until shortly before this suit was brought; and now the defendants have set it up, without any right, as an excuse for not paying over the balance of moneys in their hands belonging to the plaintiff.

The defendants state, that from time to time, as the several loans were effected, or sales of notes made, they rendered accounts and statements of the transactions, showing the terms of sale, their charges for commissions, and the net proceeds, of which accounts and statements they have retained no copies; and they now state, on the advice of their counsel, that it is necessary that they should have copies, or inspection and an opportunity to take copies, before they can safely answer the complaint; and for that production, etc., the motion was made.

The motion was heard at Special Term, before Mr. Justice Slossen, and an order made, that the plaintiffs either cause copies to be made at the expense of the defendants, and deliver such

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copies, under oath, etc., or deposit such accounts and statements with the clerk of the Court, so that the defendants may take copies.

From this order, the plaintiffs appealed to the General Term.

Francis H. Dykers, for the plaintiffs (appellants).

Rapallo & Doyle, for the defendants (respondents).

BY THE COURT. WOODRUFF, J.—The only object for which a discovery is now sought, and the only useful purpose which it is claimed such discovery would serve, is to enable the defendants to answer the plaintiffs' complaint.

The complaint is, that the defendants have, as the plaintiffs' brokers, received, at various times, divers large sums of money, being the proceeds of the sales of notes entrusted to them by the plaintiffs for sale; and that, on the 19th day of October, 1857, the defendants had in their hands a balance, belonging to the plaintiffs, of \$4719.54, being proceeds of such sales, received by the defendants, over and above all commissions for selling, etc.

The accounts, or statements, of which discovery is sought, can be material or useful for the purpose of answering the complaint, only from their connection with, or relation to, the possible defences which the defendants may make to the claim.

We cannot learn, from the complaint or affidavits on which the order was made, nor is it suggested by the defendants' counsel, that there is any defence in this case, unless it consist of one or more of the following, viz.:—

A denial that the money claimed by the plaintiffs was received by the defendants; a denial that it remains in the defendants' hands; or, what may be equivalent, and perhaps a better answer, an averment that the defendants have paid it over to the plaintiffs; or, lastly, a claim to set off the defendants' commissions, or the value of their services rendered to the plaintiffs in negotiating the sales mentioned.

The papers sought may, perhaps, be useful when the defendants come to prepare for trial; but how they are necessary to enable the defendants to answer the complaint, is not apparent;

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it does not appear from the papers, and counsel failed to suggest any reason, why it was deemed necessary.

If the defendants know or believe that they have received the plaintiffs' money, they can and ought to admit it. If they have not knowledge or information sufficient to form a belief, they are not bound to admit it, but may state the want of such knowledge and information, and this will constitute an issue.

If they know, or upon information believe, that they have not received the money, they can say so.

If, having received it, they know or believe that they have paid it over to the plaintiffs, they can so state.

And, finally, if they know or believe that the sum claimed, or any part of it, is justly due to them, or that they are entitled to retain it for commissions or for services, there is not the slightest difficulty in averring this in their answer.

It may possibly be true, that in the accounts and statements which the defendants have rendered, they have committed themselves by what is tantamount to an admission that they have no claim to retain this money from the plaintiffs; or there may be other reasons, appearing in these statements, which make the defendants feel it to be dangerous to answer under oath, lest these statements and accounts, rendered by themselves, may convict them of error; but this is no reason for compelling a discovery. Or it may be, that if the accounts and statements were produced, the defendants would be satisfied that their claim could not be established, and so would not think it best to answer at all; but it is not with a view to any such result that a discovery will be ordered. Discovery may be ordered to assist a defendant to facts without which he cannot frame an answer, with safety to his rights; but it is not intended to protect him from answering untruthfully, or to inform him how fully he may have furnished the plaintiff with the means of disproving the answer which he may propose to interpose.

The papers sought by the defendants' motion, cannot furnish the materials for their answer, though their examination might be a useful precaution, admonishing the defendants not to answer untruthfully, if they were so inclined.

The order appealed from must be reversed.

Ordered reversed.

JAMES S. SLUYTER, Respondent, *v.* J. BRICE SMITH, impleaded,
etc. Appellant.

1. Where the summons in an action is signed by the firm name of two attorneys who are in partnership, and the complaint is served with the summons, signed with the individual name of one of such attorneys only, and all subsequent notices and papers in the action are signed by such individual name of the attorney last named, the Court has the power after judgment to amend the summons by substituting the individual name of the attorney for such firm name.
2. Where it becomes necessary to amend a judgment, and the judgment record in the particular above mentioned, and also by striking out an award of costs erroneously directed, it is not proper to make an actual obliteration of the record, or an erasure of such parts thereof as are deemed erroneous or intended to be amended. It should be done by entering an order of amendment in the proper order book kept by the clerk, and appending a copy thereof to the judgment record. It is also proper to mark the passages struck out by the amendment by brackets or lines of distinction, and to refer by an entry in the margin of the judgment to the order of amendment by its date; or the judgment, as amended, may be entered at length if the party so desire.
3. In an action for the recovery of money only brought against two or more defendants upon an alleged joint contract, if one of the defendants fails to answer, and the others deny the plaintiff's allegation, the plaintiff cannot regularly enter up judgment against the one defendant for the want of an answer, and then proceed to trial and judgment against the other defendants.
4. In such case he should bring the cause to trial as against all of the defendants to the end that he may, upon the trial of the issues, have one assessment of damages, and one judgment against all of the defendants.
5. On bringing the cause to trial upon the issues, he may have such assessment, and may have such judgment against the defendant who does not answer, although he fails on the trial of the issues to show that he is entitled to recover against the defendants who have answered.
6. The right of the plaintiff to sever his action, and take judgment against one of two defendants severally liable, and the construction of §§ 186, 246, and 274 of the Code considered.
7. Where costs are allowed to the plaintiff on an adjustment by the clerk to which he has no legal right, and which the defendant cannot be required to pay without a violation of the statute, and the Court at Special Term deny a motion to correct the adjustment, an appeal lies to the General Term.

(Before all the Justices.)

Heard March 20th; decided March 27th, 1858.

APPEAL by the defendant, Smith, from a judgment entered on
B.—II.

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the 11th of August, 1857, and from an order amending the same, of the 16th of November, 1857.

The alleged irregularities and errors on which the application was made below, are sufficiently stated in the opinion.

S. Sanxay, for the appellant.

D. D. Field, for respondent.

BY THE COURT. HOFFMAN, J.—*First.* As to the order of the 16th of November, 1857.

The defendant, Smith, upon an affidavit of his own, and the judgment-roll, obtained an order to show cause why the judgment of August 11th should not be vacated, for various specified irregularities.

Mr. Justice Duer heard the application, on the moving and opposing papers, and denied the motion to vacate the judgment, but modified it by striking out in favor of the defendant a provision which subjected him to \$41, an amount of certain costs. He also allowed an amendment of the summons, by changing the name of the attorneys from Field and Sluyter, to Dudley Field.

The application by this defendant to the Judge at Special Term, was a recognition of his authority to act in the matter, unless it was so plainly *coram non judice*, that consent could not give jurisdiction.

This was not the case. The application was to the Court, to be relieved from a judgment, and to be let in to defend upon the merits. It was made under the 174th section of the Code.

The correction of the summons was plainly within the power of the Court to make, and was properly made.

The authorities cited as to amending a record are decisive. There is nothing in the Code to prevent their application. (14 John. Rep. 219; 19 Id. 244; 17 Id. 86.)

But we consider that the method of amending pursued in this case, by an obliteration or erasure, even when it leaves the passage legible, is not the proper mode. It should be by appending the order of amendment to the roll, as well as by entering it in the proper book, and by referring in the margin of the entry of the judgment to an amendment as made by an order of such a

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date. The portions changed or omitted, could be designated by brackets, underscoring or otherwise. Or the judgment may be entered anew as amended.

In chancery, the register was sometimes directed to attend with the decree, and make the alteration in open court, which the Judge countersigned with his initials. (1 Russell's Rep. 476; 1 Swans. 573, n.)

No serious inconvenience can arise in the present case from the course adopted. Certainly it is not a ground for vacating a judgment. But the practice should be such as we have indicated.

Second. As to the judgment of the 11th of August, 1857, and the appeal therefrom, the only question of moment upon this appeal, is this:—

When there are several defendants in an action, and one does not appear, or answer, and others do so, may the judgment at the trial be taken as to all? that is, against the one upon his default, and as to the others, upon the pleadings and proofs whether against them, or in their favor? And may this be done where, as in the present case, the claim is a money demand, and the complaint is not sworn to?

The defendant contends, that the judgment could only be taken against him under the 246th section of the Code; that it must be entered by the clerk; that it cannot be rendered or directed by the Court.

It may be useful to advert to the former practice, if we have not a definite rule, prescribed in the Code, that is to govern.

In chancery, an order was entered taking the bill as confessed by any defendant, as the complainant became entitled to the order; but this was only the foundation of a decree as to such defendant, when the case was brought on as to the others. There was no final decree which previously determined the case as to him. The order, taking the bill as confessed, was produced at the hearing, and recited in the decree.

Similar to this, was the practice at common law, of entering a default upon affidavit of service of the declaration and notice of the rule to plead. A common rule was entered in the clerk's office. It was the registration of a default. Then followed, in ordinary cases, the interlocutory judgment and order, that the jury

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who should try the issue should also assess the damages against the defaulting defendant.

But I understand the law to be, that except in cases of bills of exchange and promissory notes, provided for in the statute of 1835, (Sess. Laws, 248, § 2,) there cannot be a separate final judgment against one of several parties sued, nor until it can be taken against all. (Sec. 4 of the Act of 1832; Laws, p. 489.)

The rule was stated in *Van Schaick v. Trotter & Dunn*, (6 Cow. 599,) that in an action against several, if one pleads to issue, and another suffers judgment by default, damages must be assessed against both at the same time by the jury who try the issue. The judgment by default is entered as to the one before the issue is carried down for trial. Then the trial proceeds upon the defence as to one, and to try the cause as to the other, assessing the damages as to both or one, as the case may result.

Justice Birdseye, in *Cailin v. Latson*, (4 Abbott, 248,) has examined the subject with care, and treats this as the settled practice. He notices the Act of 1833, (ch. 271,) dispensing with the entry of an interlocutory judgment, and requiring only the entry of the default for not pleading.

And Justice Harris, in *Bacon v. Comstock*, (11 How. Rep. 198,) observed, that "the common-law rule was, that the judgment must dispose of all the rights of the parties. There could not be two final judgments in the same action. If the action was against two, and one of them made default, while the other interposed a defence, the plaintiff was required to omit entering judgment against the former, until the issue with the latter had been determined."

The principal sections of the Code which bear upon this question, are the 246th, the 136th, and the 274th.

The judgment which is provided for under the 274th section, is a judgment after trial, in either of the modes provided in chapters 2, 3, 4, and 5, for the trial of issues of fact or law. By that section judgment may be given for or against one or more of several defendants; or judgment may, in the discretion of the Court, be rendered against one or more, and the suit proceed against the others. This is to be by the order of the Court.

Section 246, which permits a judgment to be entered by the clerk, in an action on a contract for recovery of money, allows

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it against the defendants, or one of them, in the cases provided for in section 136.

The third subdivision of section 136 applies to the present case. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would have been entitled to judgment against such defendants or defendant, if the action had been against them, or him alone.

We may, first, observe that section 246 may be reasonably construed as permissive only, sanctioning the entry of judgment by the clerk, but not prohibiting the entry of it by direction of the Court, upon a trial of the cause as to several defendants.

But again, the third subdivision of section 136, applies to a case where, on the pleadings a separate judgment could be properly taken, and the separate proceeding, under section 246, is in such a case only. Where the contract is several, a several judgment may be had. Where it is joint it cannot be had, except under section 274; and this can only be after trial.

Such is the received construction of section 136. It was so stated by Justice Parker, in the *Mechanics' Bank v. Rider*, (5 Howard, 412;) and although this was a dissenting opinion, the case being, as to the admissibility of a co-defendant, yet, upon the present question, his view is unaffected by the decision. This is made clear by the fact, that Justice Harris, who delivered the judgment of the Court, decided the subsequent case of *Bacon v. Comstock*, (11 Howard, 197.) He held that, in an action upon a joint liability against two defendants, it was irregular to enter judgment against one who makes default, before the issues are disposed of as to another who defends. He refers to the 274th section of the Code, as authorizing the Court to do this.

And Justice Birdseye, in *Catlin v. Lawson*, before referred to, is very clear to the same point. If the suit is upon a joint responsibility, the interposition of a defence by one prevents a judgment against either, until the trial.

Third. The remaining point relates to the costs, which it is said, have been taxed at a sum not warranted by the statute. The bill has been adjusted at \$48.

The Code has not provided for a revision of the adjustment of costs made by the clerk, to whom the duty is confided. (6 Howard, 413.) The practice has been sanctioned by authority, of

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bringing the subject before a Judge of the court, generally by a motion in the nature of an appeal, at Special Term. (15 Barbour, 182; 4 Duer, 681; 10 Howard, 142.)

The rule appears to have been, that an erroneous taxation of costs was not the foundation of a writ of error. (*Ibid.*) Yet, in the Court of Chancery, an appeal from the taxation by a Vice-Chancellor would lie.

Under the Code, an appeal has been supported, when the allowance made exceeded the amount limited by the statute, although none is permitted for granting or refusing an allowance. (4 Abbott's Rep. 98.)

In the present case, the question is brought up by an appeal, not only from the judgment, but from an order which, in effect, denied an application to correct the adjustment of costs which were unauthorized by the statute. We think the question is properly before the General Term.

Then as to the items:—The trial fee of \$20 is clearly inadmissible, (11 Howard, 502.) The item of \$10 was, also, improperly allowed, (8 Howard, 33.) The cause was not noticed for trial as to this defendant.

After some hesitation, we think, also, that the \$15 for proceedings before notice of trial, must be reduced to \$10.

The judgment and order appealed from, are, in all respects, affirmed, except that the costs are to be reduced to \$13.06. No costs to either party upon the appeals.

Order accordingly.

JAMES C. WILLET, Sheriff, Plaintiff, v. THE METROPOLITAN INSURANCE CO. Defendants.

1. An answer which first denies all the allegations in the complaint, and then in subsequent paragraphs admits certain of the averments, does not leave it doubtful what allegations are put in issue.
2. But statements in an answer which are in direct conflict with each other ought not to be permitted to stand; such conflict tends to encumber the pleadings and may often render the real nature of the defence doubtful.

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3. In such case, the general denial will be struck out, unless the defendant amends, by so modifying the general denial that it shall not deny allegations afterwards in the answer admitted.

(Before WOODRUFF, J.)

Special Term; April 28th, 1858.

MOTION to strike out parts of the defendant's answer, or to make the answer more definite and certain.

The alleged defects in the answer sufficiently appear in the opinion.

A. Vanderpool, for the plaintiff in support of the motion.

J. B. Varnum, for the defendants in opposition.

WOODRUFF, J.—The defendants by their answer first deny each and every allegation in the complaint contained, and then proceed by successive paragraphs, separately numbered, to admit, in terms, many of the averments in the complaint—and then, after setting forth certain other facts, insist that two persons, not parties to the suit, are necessary parties.

The plaintiff moves that the general denial or the specific admissions (one or the others) be struck out as false—or why the answer should not be made more definite and certain in regard to various particulars covered by the general denial, and not otherwise mentioned in the answer.

In regard to this alternative, it must suffice to say that an answer which puts in issue, each and every allegation in the complaint, does not leave it doubtful which allegations are put in issue, and I am not aware that the Court have ever assumed to direct the defendant to answer the separate allegations in detail. On the contrary, the Code permits a general denial, and we cannot therefore say that when such general denial is made we will direct it to be made specific.

The apparent uncertainty respecting the defendants' answer in this case results from the fact that having first denied all of the plaintiff's averments, the defendants proceed to admit some, and the plaintiff perceiving thereby that the first denial was insincere in some particulars, feels uncertain whether the defendants will insist upon their denial in other particulars when the trial shall

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come on. The only mode which occurs to me, by which a plaintiff can avoid this embarrassment, is by verifying his complaint. The defendant will then be compelled to say upon his conscience whether the allegations are true.

There is, however, no propriety in permitting two statements to stand in an answer which are, in terms, in direct conflict with each other. First, a denial of an averment, and second, an explicit admission of its truth. It tends to encumber the pleadings with inconsistencies, and no doubt may often render the real nature of the defence doubtful.

The general denial, forming the first clause of the answer, must be struck out in this case, unless the defendants within ten days amend their answer so that that part of the answer shall not deny the allegations which in the subsequent portion of the answer are admitted.

Costs of the motion to the plaintiff \$10—to abide the event of the suit.

BURTON E. CLARK v. THOMAS S. THORP, and another.

1. In a complaint on a bond, given to procure the discharge of a warrant of attachment, issued under the Act, entitled, "Of proceedings for the collection of demands against ships and vessels," the plaintiff should, in order to sustain the bond as a statute security, not only aver the facts, showing that such warrant of attachment was duly issued, and that the bond was executed by the defendant, and that the claim of the creditor has not been paid; but also, that the bond was delivered to the officer by whom the attachment was issued, in such wise, that it became his duty to grant a discharge of the warrant.
2. If such averment be made, it will be presumed that the officer did his duty; that the applicant for the discharge obtained the benefit thereof; and that so the bond became operative in the plaintiff's favor as a statute security: although it be not averred that the officer approved the security, nor that the discharge was granted, nor that the vessel was released from the custody of the sheriff. The acceptance of the bond by the officer would import that he approved of the security.
3. And, if the warrant was not in fact discharged, nor the vessel released, the defendant must set up such facts as a defence.
4. But, where the complaint does not aver that the bond was delivered to the officer, nor that he approved of the security, nor that an order for the discharge of the warrant was granted, nor that the vessel has been released from custody, such complaint cannot be sustained upon the bond, regarded merely as a statutory security.

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5. But such a bond is, nevertheless, a valid security, and not a merely voluntary obligation; the seals import consideration; and the condition being the payment to the plaintiff of the claims, etc., exhibited, which should be established to have been subsisting liens upon the vessel, and a breach of the condition being alleged, the complaint is sufficient, notwithstanding it does not show the full compliance with the statute.

(At Special Term. Before Woodburn, J.)
June 18th, 1858.

DEMURRER to complaint. The action is brought upon a bond given by the defendants to procure the discharge of a vessel from an attachment, issued under title 8, of chapter 8, of part 8, of the Revised Statutes. (2 R. S. 493.)

That statute, after providing the claims for which a ship or vessel may be attached, (the same being liens on the ship or vessel;) the facts to be stated in an application therefor; the officer to whom application shall be made; the warrant to be issued by such officer; the duty of the sheriff in executing the warrant; the exhibition of other claims, if any there be; and the proceedings under the warrant of attachment—then provides that the owner, etc., may apply to such officer for a discharge of the warrant; and, by § 13, he “shall execute and deliver to the officer . . . a bond to the creditors, . . . in a penalty, etc. . . . with such security as shall be approved by such officer, conditioned that the obligors therein will pay the amount of all such claims and demands as shall have been exhibited, which shall be established to have been subsisting liens on such vessel . . . at the time of exhibiting the same respectively.”

And, by § 14, “upon such bond being executed and delivered, the said officer shall thereupon grant his order, discharging the warrant that may have been issued by him.”

By § 16. “In the suit upon such bond, the attaching creditors, respectively, shall state, in their declaration, their respective demands, alleging the work to have been done, or the materials or articles furnished, or the expenses incurred at the request of the master, owner, agent, or consignee of such vessel, as the case really was, averring that the claim therefor was a subsisting lien on such vessel, at the time of the exhibition thereof; . . . and shall assign as a breach of the condition of such bond, the non-payment of the claim of such creditor.”

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The supposed defects in the complaint herein, are stated in the Opinion of the Court.

The defendants demurred, upon the ground that the facts stated therein were not sufficient to constitute a cause of action; and the particular grounds relied upon are also stated in the Opinion.

Stewart Rich and Woodford, for the plaintiff.

Wm. A. Hardenbrook, for the defendants.

WOODRUFF, J.—The action is brought upon a bond given in order to procure the discharge of a vessel which was attached under, and in pursuance of title 8, of chapter 8, of part 3 of the R. S. The complaint states all the facts requisite to show the exigency under which, by the provisions of the statute, a bond to procure such discharge was proper. It then avers an application by the owners for an order to discharge the vessel, and that "thereupon, and in consideration thereof, and for the purpose of procuring said discharge, the defendants did, under seal, and in pursuance of the provisions of the statute above mentioned, make, execute, and deliver to the attaching creditor, the bond set forth in the complaint.

The bond is in due form, and the breach of the condition is sufficiently alleged. It has not been objected before me, on the argument of the demurrer, that in any of the above particulars, the complaint is defective.

It is claimed, however, that the complaint does not aver that the bond was approved by the officer to whom the application for the discharge was made, nor that it was delivered to, or accepted by him, nor that any discharge of the vessel was granted by the officer, or was procured upon, or by reason of the execution of the bond.

The statute requires (§ 13) that the bond, for the execution of which the statute provides, shall be delivered to the officer to whom the application was made, and that it shall be executed by the applicant for the discharge of the vessel, with such security as shall be approved by such officer. And by § 14, "upon such

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bond being executed and delivered," it is made the unqualified duty of the officer to discharge the warrant. If the complaint had averred that the bond had been executed and delivered to the officer, in such wise that it became his duty to grant a discharge of the warrant, I should think that sufficient. It might, I think, for all the purposes, both of pleading and proof, be assumed that the officer did his duty, and if his subsequent refusal constituted any defence to the action, such refusal, and the continued detention of the vessel might be set up by the defendant as an answer to the action. And had the averment been, that the bond was delivered to the officer, I think, also, that it would not be going too far to say, that as that word is used in the statute, it would import that he received it as a sufficient bond.

But in this complaint there is no averment that the bond was delivered to the officer; that he ever saw it; that he approved of the security; that the steps were taken by the owners upon which it became the duty of the officer to discharge the warrant; that such warrant has been discharged, or that the vessel has ever been released from custody, or that the defendants ever obtained the benefit contemplated by the execution of the bond.

If, therefore, this complaint cannot be sustained without showing that the statute has been complied with, the demurrer must be sustained.

But I think that the complaint may be, and must be, sustained upon another ground. There is no sufficient objection to the bond, as a voluntary undertaking under seal by the obligors to pay to the obligees "the claims and demands exhibited, which should be established to have been subsisting liens upon the vessel." Such payment is made the condition of the bond. The seals to the bond import consideration, and of course consideration enough to sustain the bond as a valid, binding security to the plaintiff. The statement in the complaint of the occasion of the execution of the bond does not affect the sufficiency of the consideration thus implied in the sealing and delivery, although that statement shows the motive and object for which it was executed and delivered. *Prima facie*, the bond is valid and binding. If, in truth, after it was received by the plaintiff, the purpose and object of the bond was defeated, and the vessel was still detained, that must (if it be any defence) be set up by the defendant.

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I think the demurrer to the complaint should be overruled, but with leave to the defendant to withdraw the demurrer, and answer the complaint within ten days, upon the usual terms.

Ordered accordingly.

**EDWARD P. FRY, (Respondent,) v. JAMES GORDON BENNETT,
(Appellant.)**

WHAT questions may be reviewed on appeal from a judgment: Whether the Court have power to extend the time to appeal:

How far a notice of appeal may be amended:

Effect of arguing, on appeal from a judgment, points which can only be properly considered on appeal from an order denying a new trial.

Heard in Special Term before Woodruff, J.

Heard in General Term before Bosworth, Hoffman, Slosson, Woodruff, and Pierrepont, J. J. June 19; decided June 26, 1858.

Opinion of the Court by Woodruff, J.

See the points decided at Special and General Terms, in the index to this volume, under the title "Practice—Appeal."

And see the motions and appeals reported, at length, with the Opinions therein, in 16 How. Pr. R. 385—401.

THE SAME, (Respondent,) v. THE SAME, (Appellant.)

THAT an actual written notice of an order or judgment, by act of the prevailing party served upon the adverse party, is necessary to limit the time for appealing.

That knowledge, otherwise acquired by the adverse party, will not operate to limit his time to appeal, and other points arising on motion to dismiss appeal.

(Before Bosworth, Hoffman, Slosson, Woodruff, and Pierrepont, J. J.)

Heard June, 19; decided June 26, 1858.

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Opinion of the Court by Woodruff, J.

See the points decided in the index to this volume under the title "Practice—Appeal."

And see the Motion and Opinion reported at length in 16 How. Pr. R. 402—406; 7 Abbott, 352.

DAVID OGDEN and others *v.* GEORGE JONES and another.

1. When a lot of land was conveyed, in 1783, to P. by W. 28 feet in breadth in front and rear, by precise boundaries, but the grantor excepted and reserved to himself and his heirs and assigns, forever, one-half of the westerly wall erected or to be erected by P. or any other person holding or claiming under him on the westerly side of the premises adjoining the lot of W. and W. covenanted to pay half the expense of maintaining and supporting such wall; and P. erected a dwelling house on such lot, 28 feet in front, with a westerly wall 12 inches in thickness; and W. afterwards erected a dwelling house on his lot, using such westerly wall as a support therefor.

Held, that the reservation in the deed in connection with the covenant of W. did not reserve to W. the fee in the ground on which the half of the wall was erected, nor any such property in the wall as entitled him to remove it, or to cut it away, or undermine it, or build upon it, but only the right to use it as a support for his adjoining building.

2. Neither W. nor his grantees have any right to cut away the front of P.'s house and extend the front of the building on such adjoining lot, over the westerly line of the 28 feet, so as to present to the exterior view a front extending to the centre of such westerly wall.
3. An injunction will be granted, in such case, to prevent a grantees of W.'s lot from interfering with such westerly wall, in any manner, except by using it as a support for the adjoining building.

(At Special Term; Before Woodruff J.)
July, 1858.

AN application was made, in this case, by the plaintiffs for an injunction to restrain the defendants from cutting away a narrow strip of six inches in width from the front wall of the plaintiffs' house, and extending from the ground to the top of the wall, and from extending the front of a store, in progress of erection, over and in the place of the six inches so cut away; so that the apparent width of the front of the plaintiffs' building would be six inches

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less, and the apparent width of the front of the defendants' building would be six inches greater than heretofore.

On an order to show cause why an injunction should not be granted or continued, *pendente lite*, with a temporary restraint till the motion could be heard, the matter was brought to a hearing at Special Term.

The material facts were these: In 1793, James Watson and James Greenleaf were each the owner of one-half of a lot of ground on the north side of State street, 28 feet in width in front and rear, and the said Watson owned a lot next westerly thereof, and the said Greenleaf owned a lot next easterly thereof.

By several deeds the said Watson and Greenleaf conveyed the said lot of 28 feet to Daniel Penfield, describing it as beginning at the south-east corner of Watson's lot, and running thence easterly along State street 28 feet, thence northerly 100 feet, thence westerly along Smede's and Brown's lot, 28 feet, to said James Watson's lot, thence southerly along said Watson's lot to the place of beginning, "*excepting and reserving to the said James Watson and his heirs and assigns, forever, one-half of the wall erected or to be erected by the said Daniel Penfield, or any other person holding or claiming under him on the westerly side of the premises adjoining the said James Watson's lot,*" together with, etc. And in the deed from Greenleaf was a similar reservation in his favor, in respect to the easterly wall.

Watson and Greenleaf then covenanted for themselves and their heirs and assigns, each to pay one-half of the expense of keeping up and supporting said walls, respectively.

The lot so conveyed to Daniel Penfield, (now No. 4 State street,) 28 feet in width, by sundry *mesne* conveyances has come to the plaintiffs in this action; and the lot of Watson adjoining, westerly thereof, (now No. 5 State street,) has come to the defendants.

Penfield, at about the time of the conveyance to him, erected a brick dwelling house on his lot, having a westerly wall 12 inches in thickness, and showing a full front on State street of 28 feet. Soon after a brick dwelling house was erected on Watson's lot, for the support of which the westerly wall of Penfield's house was used as and for its easterly wall.

These dwelling houses have continued on such lots until the

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present time, and now the defendants have taken down the dwelling house on their lot, (No. 5,) and are about erecting a large store-house thereon, and intend not only to use the said westerly wall of the Penfield house (belonging to the plaintiffs) as a support to their said store-house, but to build thereon, and also intend to cut, and have begun to cut away the front, or six inches of the end of such westerly wall where the same forms part of the front on the street, and to extend the front or stone facing of their store-house over the line of the 28 feet to the centre line of the said westerly wall, so that the apparent front of their store will be six inches wider than the front of their dwelling house was, and the apparent front of the plaintiffs' dwelling house will be reduced to the same extent.

The injunction, sought to be continued, restrained the defendants from cutting away any part of the front of the plaintiffs' dwelling house, or of the front end of such westerly wall, and from excavating beneath, or building upon such westerly wall of the plaintiffs' house.

Charles Jones, for the plaintiffs.

Daniel Lord, for the defendants.

WOODRUFF, J.—The whole of the lot No. 4 State street, 28 feet in front and rear, was conveyed to Daniel Penfield, by Watson and Greenleaf, and afterwards by Jas. T. Watson, to Jonathan Ogden, under whom the plaintiffs hold the same.

The reservation in the deed from Watson and Greenleaf to Penfield; the covenant by Watson and Greenleaf, and the subsequent reservation in the deed to Jonathan Ogden, show, 1st. That Penfield was expected to erect, and did, in fact, erect the house upon the lot conveyed to him, covering the whole 28 feet.

2d. That Watson intended to reserve and have a right of property in half of the wall which Penfield should erect—not for the purpose of removal, as of his own absolute property, but to be used and enjoyed where it stood, (and just as Penfield or his grantees should build, keep up, and sustain the same, and not otherwise,) as and for a protection and support to the house on the adjoining lot, No. 5.

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3d. That it was intended and expected, that Watson or his grantees should have a house adjoining, (on lot No. 5,) whose front should begin at the westerly termination of the 28 feet granted, but which should be connected with, and use the end wall as a protection and support thereto; and for that purpose, and for such use, the property in one half thereof, should be vested in Watson.

4th. The wall was not only to be built by Penfield, but was to be kept up, and sustained by him and his grantees, heirs, etc. Watson and his heirs and assigns were bound to pay one half of the expense of keeping up and sustaining the entire wall. But they had, by virtue of the reservation, no right to build, nor any right to interfere with the wall, save only to exercise the limited right which its devotion to the special purpose, above stated, secured to them—and save only to use and enjoy the wall in the manner above stated, he or they had no right to come over the exterior line of the 28 feet at all. They were neither bound nor at liberty even to repair, keep up, or sustain the wall, so long as Penfield and his heirs or assigns were ready and willing to do so. They were to pay him for doing this, to the extent of one half of the expense. If Penfield and his heirs or assigns neglected or refused, they might, doubtless, *ex necessitate*, perform the work, and seek indemnity; but this they would do, as one of their remedies, upon Penfield's default, and not because it was a privilege conferred directly by the terms of the deed or the reservation.

5th. That absolute property in the half of the side-wall, in the sense which would entitle Watson to remove it, or any part of it, was not the intention of the parties, nor the true construction of the instruments, is apparent, not only from the fact, that it was a wall to be erected by Penfield, but also from the fact, that it was to be kept up and sustained by him, and his heirs and assigns, while Watson was to pay one half of the expense. And if the defendants are at liberty to insist upon their ownership, as importing any other rights than above indicated, it is obvious to observe, that if their rights, as owners, were to be strictly construed, then no part of the wall on the westerly side will appear on the face of the wall on the front—and no part of the wall on the front of the lot will appear on the face, or outer surface, of

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the side-wall. There is no more propriety in saying, that six inches in width on the face of the front is half of the end of the side-wall, than there would be in saying, that the like depth appearing on the outer surface of the side-wall is half of the end of the front wall. A diagonal from the corner drawn through the wall, leaving the face of both walls entire, is the strict line of division between them. On a narrow and technical construction of the strict right of property, this view of the line and limit of the reservation would be accurate. But in the view above taken of the practical uses and purposes for which the reservation was made, it is clear, I think, that the defendants have the use of the wall, so that it shall serve as a protection and support to their building, without so rigid a regard to the line last suggested.

But neither view of the subject gives them any right to cut away or remove the front surface for any purpose.

6th. Watson, and under him, the defendants, were to have and use the wall that Penfield and his assigns should build, and did build, and as he or they did build it, and not otherwise, and no other or different wall. They had no right, (so long as Penfield and his assigns did erect, keep up, and maintain a wall on the westerly side of the lot conveyed to Penfield,) to build any wall, or any part of a wall on the premises conveyed, nor to enter on those premises for any such purpose. They were to take, have, and use the wall Penfield, etc. built, and that only. They cannot go upon, or over the line of the 28 feet, to build under nor over the wall he erected. Nor can they extend the front of their building upon or over any part of the lot granted to Penfield. If the wall erected, and heretofore sustained, does not now fully satisfy the wishes of the parties, its alteration or extension is a proper subject for negotiation and mutual arrangement.

And finally, the construction above given to the deeds—the reservation and the covenants—is the construction given thereto by the immediate parties and their grantees. The actual erection of the houses in the manner above suggested, and the use and enjoyment thereof for over sixty years, with all the benefits and advantages to the plaintiffs, and their grantors, (if any there be,) in having the front of their house exhibit a width of 28 feet, ought to conclude the parties. Indeed, the very fact, that the

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defendants now assume to make their front wall extend over the place in contest, is an admission that they are seeking not to use or treat it as a side-wall of the adjoining house, (erected by another,) in which they have an ownership, but to make it a part of their own front wall, and so to exhibit it in external appearance.

The instruments, and the acts, and conduct of the parties under them, for over 60 years, show, I think, not only that the whole land was conveyed, and intended to be conveyed, but that the intent was, from the beginning, that Penfield and his assigns should have a front of 28 feet, and a building of that width, subject only to a use of one half of the wall on the west side, (which he should erect, and he and his assigns should keep up and sustain,) as a protection and support to the house of Watson and his assigns, which they might erect adjoining, but not in any part upon or over the premises described in the deeds.

And Penfield having so erected his house, and the same having been used and enjoyed, as it now is, for more than 60 years, the front face of the wall in front, is to be protected from encroachment.

These views in like manner compel me to the conclusion that without the plaintiffs' consent, the defendants have no right to build under nor upon the wall, nor to extend it towards the rear. As it was built, and has been kept up and sustained, they have a right to use it as a support to the house or store which they are now building.

The injunction heretofore granted, must, therefore, be continued. Ordered accordingly.

DAVID BANKS, Receiver, etc. of the East River Bank, Respondent,
v. THOMAS MAHER and JOHN C. McCARTY, impleaded with
JOHN P. ANGEVINE, THOMAS H. SIMONSON, and HORATIO N. GALLUP, Defendants and Appellants.

1. When, pending an action, the whole interest of the plaintiff in the cause of action has been transferred to a third person, the Court, on the application of such third person, may allow him to be substituted as plaintiff.
2. Although the original plaintiff sue as Receiver of a bank, and his appointment

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- as Receiver is put in issue by the defendant's answer, the Court, on a motion to substitute, as plaintiff, a person to whom the Receiver's interest has been transferred, will not investigate and determine such issue, though required to do so by the defendants' counsel. Such an issue can only be tried and determined on the trial of the action.
3. Nor will the Court, as the general rule, on a motion made by the plaintiff, after a cause is at issue, and in the orderly course of proceeding, consider the objection, that the complaint does not state facts sufficient to constitute a cause of action.

(Before BOSWORTH, CH. J. HOFFMAN, SLOSSON, WOODRUFF, and PIERREPONT, J. J.)
Heard, October 28; decided, October 30, 1858.

THIS case comes before the Court at General Term, on an appeal by the defendants, Maher and McCarty, from an order made by Mr. Justice Hoffman, on the 24th of September, 1858, substituting the "East River Bank" as plaintiff in the action, instead of "David Banks, Receiver, of the East River Bank." The appellants are sued as second indorsers of a promissory note. The complaint alleges the making, indorsement, and delivery of the note to said bank, the appointment of David Banks as receiver of the bank, and that he, as such receiver, is the lawful owner and holder of the note, presentment of it at maturity for payment, its non-payment and protest, and due notice thereof to the indorsers. The answer of the appellants, by denying any knowledge or information sufficient to form a belief, puts at issue the allegations as to the appointment of Banks as receiver, and as to his being, as receiver, the lawful owner or holder of the note, and as to the presentment of the note for payment, and its protest for non-payment, and as to notice of non-payment, and protest to the indorsers. After the cause was at issue, on an affidavit that an order had been made, declaring the bank solvent, and discharging the receiver, and directing him to transfer to the bank all property held by him as such receiver, and that he had made such transfer, (which included the note in suit,) and that the bank "is now the sole owner and holder of said note, and the real party in interest in the action," the said receiver, and the bank, gave notice of a motion, for leave to substitute the East River Bank as plaintiff in this action, and to continue the same in the name of the East River Bank."

The motion was opposed on an affidavit, stating that the appointment and title of the receiver were put at issue, and the be-

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lief of the appellant's counsel, that the appointment was void; and that such motion was made to get rid of that objection. Such, counsel offered to read, in opposition to the motion, the application for the appointment of such receiver, for the purpose of showing, (as he alleged,) that the Justice who made the appointment, had no jurisdiction; which offer was overruled. The motion to substitute was granted, and from that order, the defendants, Maher and McCarty appealed to the General Term.

T. James Glover, for defendants and appellants.

E. E. Anderson, for respondents.

BY THE COURT. BOSWORTH, CH. J.—The papers on which the order appealed from was made, show that all the interest of David Banks, as Receiver of the East River Bank, in the note in suit, has been transferred, and the note delivered to said bank, and that said bank is the real party in interest in this action. These facts are not controverted, nor is there any attempt, in any of the papers, to controvert either of these facts. Section 121 of the Code confers power, on such a state of facts, to make the order in question.

On the motion for the order, the Justice before whom it was heard declined to investigate the validity of the receiver's appointment, and refused to look at the application for his appointment with a view to pass upon the question, whether the officer to whom it was addressed and presented, acquired jurisdiction to appoint a receiver.

We think his refusal furnishes no reason for reversing the order appealed from. Had he pursued the course urged by the appellant's counsel, and determined the questions which he was urged to consider and determine, the plaintiff would, or might have been deprived of a trial of the issues made by the pleadings, by a court and jury.

The action is one for the recovery of money; the issues joined in it are issues of fact, and must be tried by a jury: § 253. They must be tried in open court, after the action has been duly noticed and placed on the calendar.

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On such a trial, the question of the validity of the receiver's appointment, and of his title, may, it is true, be a pure question of law; but the plaintiff's right to have it determined on the trial of the action, is as clear and absolute, as if the question were one of fact, and to be determined by the jury alone.

The objection, now urged, that the complaint does not state facts sufficient to constitute a cause of action, even if a plausible one, cannot be taken as an answer to every motion that the plaintiff may make, in the orderly course of proceeding, after the action is at issue on issues of fact. It is no answer to a motion for a commission, or to an application for a discovery, or to any of the ordinary motions made in the progress of a trial. It may be taken at the trial, and perhaps on an appeal from the judgment, though not taken at the trial.

But it is quite clear, that after the action is at issue on issues of fact, the defendant cannot, on motion, obtain an order at Chambers or Special Term, dismissing the complaint, on the ground of such a defect in the complaint.

We think it would have been improper for the Judge, who heard the motion, to have tried and passed upon the question of the receiver's title. The appellants suffer no prejudice by his refusal to do so. The issues made by the pleadings are unchanged. The appellants, if no order had been made, would have been compelled to try the same issues that they must now try. No objection is made, that the substituted plaintiffs are not abundantly responsible for any costs the defendants may recover.

As we understand the argument of the appellants' counsel, he does not consider their grounds of defence impaired or affected by the order appealed from, if no change shall be made hereafter in the issues to be tried; but he is apprehensive that they may be prejudiced by some inequitable order affecting the issues that may be made hereafter.

We cannot reverse an order, proper in itself, from any such apprehension. It was a matter in the discretion of the Judge, whether he would make the order or not.

Treating the order as appealable, the views already stated are sufficient to dispose of all objections that have been urged against it. If not appealable—a point on which we do not deem it necessary to express an opinion—neither the appellants, who insist that

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it is appealable, nor the respondents, who insist that it is not, can be prejudiced by the affirmance of the order, instead of a dismissal of the appeal.

The order must be affirmed, with \$10 costs.

THE XENIA BRANCH OF THE STATE BANK OF OHIO, Plaintiffs (Appellants), v. JAMES LEE and BENJAMIN C. LEE, Defendants (Respondents).

1. In an answer, containing several defences, each defence, separately pleaded as a distinct defence, must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer.
2. The former rule, which required each plea to be complete in itself, and to constitute a defence to the allegations to which it was addressed, has not been relaxed by the Code.
3. These propositions do not necessarily import that, in order to avoid repetition, allegations of fact, which form a part of several defences, may not be once stated, and be thereafter incorporated in each successive defence, by appropriate words of reference, instead of repeating them at length in each.
4. On a demurrer to an answer, on the ground that the averments therein are not sufficient to constitute a defence or counter-claim, if the Court are clear in their opinion, that the answer is defective in substance and the demurrer is well taken, they will sustain the demurrer, although the ground of their opinion is one which was not suggested nor discussed by counsel on the argument.
5. In an action, in the nature of Trover, brought to recover the value of notes or bills of exchange from a defendant who claims title thereto through the plaintiff's endorsement, where the plaintiff sets out the title under which the defendant claims and seeks to recover such value, by impeaching that title, the defendant may set up and affirm his own title, aver demand of payment, refusal, protest, and notice to the plaintiff of non-payment; and demand, by way of counter-claim, a judgment against the plaintiff, as indorser of such notes or bills.
6. Such a counter-claim is proper, both as "arising out of the transaction, which is set forth in the complaint as the foundation of the plaintiff's claim;" and also, as a cause of action, "connected with the subject of the action."
7. The definitions of a counter-claim, in § 150 of the Code, considered; and the extension of the right beyond claims formerly set up, under the name of recoupment, also noticed.

(Before BOSEWORTH, CH. J., HOFFMAN, SLOSSON, and WOODRUFF, J. J.)
Heard, Oct. 23d; decided, Nov. 18th, 1858.

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THIS action came before the General Term by appeal from an order, overruling the plaintiffs' demurrer to the "fifth separate defence," contained in the defendants' answer.

The complaint alleged, that the defendants, about the 15th day of July, became possessed of certain six bills of exchange, (particularly described, drawn for sums amounting in all to \$17,400,) under the circumstances set forth, viz.: that the said bills were drawn in Ohio, in the regular course of business, and were, at or about the respective dates thereof, regularly discounted by the plaintiffs, whereby the plaintiffs became the owners and lawful holders thereof; that the plaintiffs indorsed the same only to facilitate the collection thereof, and thereupon transmitted the same to their agent, the Ohio Life Insurance and Trust Company, at its office in New York: but only for collection, and payment of the proceeds to the plaintiffs, the said Trust Company not being authorized by the plaintiffs to sell, pledge, or in any manner dispose of, or use, said bills, except in collecting the sums secured thereby, respectively, for the account of the plaintiffs, and for remission to said plaintiffs.

That the said Trust Company, before the receipt of such bills, was indebted to the defendants for moneys, loaned by the latter at usurious interest; and the Company, without authority, and in violation of their duty to the plaintiffs, transferred and delivered to the said defendants the said bills of exchange, as collateral security for such usurious and precedent indebtedness; and the defendants received, and have ever since retained them, under the pretence of holding them as such collateral security, and not otherwise; that the defendants did not receive them in regular course of business in, good faith, nor for a valuable consideration; but took them, chargeable with knowledge that the same were the property of the plaintiffs, and that the Trust Company had no authority to transfer them.

The complaint then states, that by a statute of Ohio no notes or bills discounted by any banking company shall be assignable, except for collection, or to pay or redeem its circulating notes, or to pay its other liabilities; and that the defendants had due notice thereof.

That the plaintiffs, on the 28th August, 1857, demanded the bills from the defendants, and they refused to deliver the same,

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and detained, and still unlawfully detain, the same, and have converted them to their own use.

That the bills were of the value of \$17,400 when so demanded, less a rebate of the interest for the time the bills then had to run.

It demands judgment for such sum of \$17,400, with interest from the days of the maturity of the bills.

The answer of the defendants contained, *First*, a general denial of the allegations in the complaint, and each and every of such allegations.

Then "*Second*: The defendants, for a separate defence, etc., say," etc.

Then "*Third*: And these defendants, for a separate defence, etc., say," etc.

Then "*Fourth*: And these defendants, for a separate defence, etc., say," etc.

The particulars of these defences, it is unnecessary to state, since they were not demurred to.

Then "*Fifth*: And, for a separate defence to the alleged cause of action in said complaint contained, and, by way of counter-claim thereto, these defendants further say:"

Here follow precise statements of the drawing of each of the six bills of exchange by the respective drawers thereof; the acceptance, or the waiver of acceptance, thereof; the endorsement thereof, in blank, by the payees of two thereof, and their delivery to the plaintiffs; and as to four thereof, that they were drawn, payable to the order of, and delivered to the plaintiffs; that the plaintiffs, by their cashier, acting in his official capacity, duly endorsed each of the said bills to the said Trust Company, by an endorsement, in words, "pay Edwin Ludlow, cashier, or order"—said Ludlow then being the cashier of the said company—and duly delivered such bills to the said Trust Company, who then became the legal owners and holders thereof.

That, before their maturity, the said Trust Company, duly endorsed, for value received, and delivered the said bills of exchange to the defendants, who then became, and now are, the legal owners and holders thereof.

The answer then alleges, due presentment, demand, refusal, and protest of the said bills of exchange for non-payment, and notice

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thereof to the plaintiffs; and that the amounts of the same respectively, with interest from the maturity thereof, and expenses, are due to the defendants thereon from the plaintiffs; for which the defendants claim judgment against the plaintiffs. And, finally, this part of the answer avers, that the bills of exchange therein described are the same instruments, etc., in the complaint mentioned.

To that portion of the answer which is set forth, fifth, as a separate defence, the plaintiffs demurred, and assigned, as grounds of demurrer, under five different forms of expression, that the same, and the facts therein stated, are not sufficient to constitute a defence, nor a counter-claim.

The demurrer was brought to argument at Special Term, before Mr. Justice Hoffman, and the demurrer being overruled, the plaintiffs appealed to the General Term.

Wm. Stanley, for plaintiffs (appellants).

C. A. Seward, for defendants (respondents).

BY THE COURT. WOODRUFF, J.—The plaintiffs herein, by their complaint, allege the drawing of sundry bills of exchange in the State of Ohio, by various drawers; the discounting of such bills by the plaintiffs in regular course of business, whereby they became the lawful holders and owners thereof; the endorsement of the said bills by them to the Ohio Life and Trust Company for collection, and the transmission thereof to the said company at New York, for that purpose only; the transfer and delivery of the bills to the defendants in this suit by the said company unlawfully, without authority, and in violation of its duty, and as collateral security for a precedent usurious indebtedness owing by the company to the defendants; that the Trust Company had no authority to transfer the bills; that the defendants took them, chargeable with knowledge, that the same were the property of the plaintiffs, and that the Trust Company had no authority so to transfer or deliver the same; the retention of the bills by the defendants; a demand of the same from the defendants by the plaintiffs, and a refusal to deliver them:

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and the plaintiffs thereupon demand judgment for the value of the bills, with interest from the maturity thereof respectively.

That portion of the defendants' answer which is demurred to, and which is stated, *fifthly*, as a "separate defence," sets forth with greater particularity the drawing of the bills, the terms thereof, and their delivery to the plaintiffs, the endorsement and delivery thereof by the plaintiffs to the Ohio Life Insurance and Trust Company, and the endorsement and delivery thereof by that company for value, to the defendants, averring, that the defendants then became, and now are, the legal owners and holders thereof.

The answer then avers the demand of payment, refusal, protest, and notice to the plaintiffs as endorsers, and claims thereupon to have judgment against the plaintiffs for the amount thereof.

The plaintiffs' demurrer assigns for cause, that this part of the answer does not state facts sufficient to constitute either a defence or a counter-claim.

If we are to consider this fifth and separate defence as it is pleaded, *viz.*, as a separate defence to the action, and judge of its sufficiency as an answer to the complaint, it is material to notice, that it does not contain any denial that the transfer by the Ohio Life and Trust Company to the defendants was without authority; that the bills were held by that company for collection only; that the transfer was in violation of the duty of that company to the plaintiffs; that the defendants took them chargeable with knowledge that the same were the property of the plaintiffs, and that the company had no authority so to transfer them; and, especially, that the bills were transferred to the defendants by the company as a collateral security for a precedent usurious indebtedness.

It is quite obvious, that if these bills were transferred to the defendants, in fraud of the rights of the true owners, (the plaintiffs,) and only to secure an antecedent debt, the defendants are not entitled to retain them as against the plaintiffs, nor can they make a title, so acquired, the foundation of any claim to recover the amount thereof from the plaintiffs, under the endorsement by the latter.

And it is equally clear, that if the bills were so transferred in

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fraud of the plaintiffs' rights, but to secure to the defendants a usurious demand claimed by them of the Trust Company, the defendants have no title to retain them from the plaintiffs, nor to found a counter-claim thereon.

And so, if the averment, that they took them chargeable with knowledge that the same were the property of the plaintiffs, and that the Trust Company had no authority to transfer them, may be regarded as a statement of a fact, then their title to retain the bills, and their title to set them up as a counter-claim equally fail.

The answer, in this case, it is true, contains a denial of the allegations of the said complaint, and each and every of the said allegations. This is the "first" defence set up in the answer. If this may be referred to, and be made to spell out the fifth defence, then it is not true, that the allegations above referred to are not denied. But it is equally true, that if, in determining the sufficiency of the fifth defence, we are to take the first defence to be true, then the defendants have no title—for the counter-claim rests upon the very same transfer to the defendants which the complaint alleges, and which this first defence denies; and if no such transfers were made, or if no such bills were drawn as the complaint alleges, then, whether the plaintiffs have any title to recover or not, it is clear, that the defendants have no counter-claim.

This palpable conflict of allegations, if it shows nothing else, illustrates the impropriety and inconsistency of attempting to sustain one defence pleaded separately, by incorporating therein another distinct defence, containing averments partly consistent and partly inconsistent therewith, and which, if taken to be wholly true, would destroy the defence sought to be aided.

Other considerations, however, which seem to us to be quite conclusive, forbid the attempt thus to bolster up a defence separately pleaded, and affirm the true rule to be, that each defence so separately pleaded, must be in itself complete, and must contain all that is necessary to answer the whole cause of action—or to answer that part thereof which it purports to answer.

Section 150 of the Code permits a defendant to set forth, by answer, as many defences and counter-claims as he may have, whether legal, or equitable, or both. They must each be separately stated, and refer to the causes of action which they are in-

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tended to answer, in such manner that they may be intelligibly distinguished.

This language, of itself, imports, that when more than one defence or counter-claim is interposed, each must be a sufficient defence or counter-claim, to answer that cause of action to which it is addressed; or, where the cause of action can be divided, then to answer a part thereof. The provision in this respect, is even more explicit and guarded than the similar language in the Revised Statutes, which permitted "the defendant in any action, to plead as many several matters as he shall think necessary for his defence." (2 Rev. Stat. 352, [§ 9,] 27.)

The requirement to state them separately, imports that these separate statements are not to be parts of a defence. Unless they are legally complete and sufficient, they are not defences—and if it is necessary to their completeness, to refer to, and include part of what is alleged as another distinct defence, then they are not separately stated.

This is made still more clear by section 153, which permits the plaintiff to "demur to one or more of such defences or counter-claims, and reply to the residue of the counter-claims." The reason for requiring a separate statement of each defence or counter-claim here becomes apparent. It is not merely, that the pleading may be thereby presented in an orderly form, and be more intelligible, but that the plaintiff may address his demurrer specifically to any one of the separate statements set up as such defence or counter-claim, and allege its insufficiency.

It is unnecessary to do more than refer to the familiar rule under our former system, that required each plea to be complete in itself, and to constitute a complete defence to the allegations to which it was addressed. (1 Chit. Pl. 511; *Nevins v. Keeler*, 6 J. R. 63; *Spencer v. Southwick*, 11 J. R. 593; *Hallett v. Holmes*, 18 J. R. 28; *Van Ness v. Hamilton*, 19 J. R. 349.) The same reason now exists; and there is nothing in the language of the Code indicating that the rule is now relaxed, but as already intimated, the contrary is plainly involved in the provisions of the Code itself.

How far it may be competent for a defendant, for the purpose of avoiding repetition, to aver once for all, certain facts alike applicable to each of several defences or counter-claims, and having

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averred them, either in one of his distinct and separate statements of a defence, etc. or by way of introduction to all, to thereafter, in his subsequent separate statements, refer intelligibly and distinctly to them, so as by reference to clearly include them in each, it is unnecessary to consider—no such attempt is made in the present case.

These views inevitably lead to the conclusion that the fifth "separate defence" here demurred to is insufficient. It contains no denials of the allegations in the complaint above enumerated, nor any averments inconsistent therewith. These allegations must, therefore, for the purposes of this demurrer, be taken as admitted.

We are not unmindful of the circumstance that the arguments addressed to us in support of the demurrer upon this appeal did not embrace the objections to the answer which have thus far been considered; and the suggestion may naturally arise, that the Court are not called upon to seek out defects in the answer to which counsel have not called their attention. This may sometimes be so, where the objections relate to matters which are formal merely, or which would be cured by a trial and verdict upon the very right of the matter. But we are not willing in this cause to enter a deliberate judgment, which on the record, pronounces this defence a sufficient defence, when we are clear that it is wholly defective and insufficient. Indeed, it is very far from clear that by so doing we should not injure the very party in whose favor we should so pronounce judgment; for should that judgment become the subject of review in the court of last resort, it must, we think, be pronounced erroneous, and be reversed. And we do not see how that Court could be informed what arguments were urged here, or that we did not decide, on all grounds, that the defence was sufficiently pleaded.

The reasons given are therefore decisive of the present appeal, and we might dismiss the subject without disposing of the question actually argued; but the parties have come to the discussion of this appeal for the purpose of testing the defendants' right to set up the matters contained in this answer as a counter-claim. There is little doubt that the defendants will amend the answer by inserting in the fifth defence the matters of denial, which are already contained in other parts of the answer, and which, if

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inserted in the fifth defence, would relieve it from the objections which have been noticed. And if we refrain from the expression of an opinion upon the main question, we probably only put the parties to the expense and delay of coming here again, upon a fresh demurrer and new appeal, to argue again the very question already fully and ably argued on this occasion. Under such circumstances, we think they are now entitled to our views upon that question.

Indeed, if we have considered that question, and are of opinion that such a counter-claim is not to be allowed, it may be pertinently asked, why should the Court consider, at all, the defects in the answer which have above been pointed out?

The great question in controversy then, is, in an action, in the nature of trover, by a plaintiff who has endorsed notes or bills of exchange, brought to recover the value thereof, from a defendant in whose possession they are, and who claims title thereto through the plaintiff's endorsement, can the defendant set up title in himself, demand of payment, protest, and notice, and ask, by way of counter-claim, a judgment against the plaintiff as endorser?

By § 150 of the Code, subd. 1 and 2, the counter-claim which the defendant may set up in his answer may be 1st, "a cause of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim, or connected with the subject of the action;" and 2d, "in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

This division of the section shows that there may be a counter-claim when the action itself does not arise on contract—for the second clause is expressly confined to actions arising upon contract, and allows a counter-claim in such cases of any other cause of action, also arising on contract; and this may embrace, probably, all cases heretofore denominated "set off," legal or equitable, and any other legal or equitable demand, liquidated or unliquidated, whether within the proper definition of set off or not, if it arise on contract. (*Gleason v. Moen*, 2 Duer, 642.)

The first sub-division would therefore be unmeaning, as a separate definition, if it neither contemplated cases in which the action was not brought on the contract itself, in the sense in

which those words are ordinarily used, nor counter-claims which did not themselves arise on contract.

This first subdivision, by its terms, assumes that the plaintiff's complaint may set forth as the foundation of the action, a "contract," or a "transaction."

The legislature, in using both words, must be assumed to have designed that each should have a meaning; and in our judgment, their construction should be according to the natural and ordinary signification of the terms.

In this sense, every contract may be said to be a transaction; but every transaction is not a contract.

Again, the second sub-division having provided for all counter-claims arising on contract, in all actions arising on contract, no cases can be supposed, to which the first sub-division can be applied, unless it be one of three classes, viz:

1st. In actions, in which a contract is stated as the foundation of the plaintiff's claim, counter-claims, which arise out of the same contract, or—

2d. In actions in which some transaction, not being a contract, is set forth as the foundation of the plaintiff's claim, counter-claims, which arise out of the same transaction, or—

3d. In actions, in which either a contract, or a transaction which is not a contract, is set forth as the foundation of the plaintiff's claim, counter-claims, which neither arise out of the same contract, nor out of the same transaction, but which are connected with the subject of the action.

Whether this analysis of the first sub-division makes its import more clear, or will aid in its application to particular cases, we will not affirm; but we think it is plainly a true distribution of the language of the section, and a necessary reading of the sub-division, if all its terms are to have any meaning.

1st. What, then, is meant by the clause, which "in actions in which a contract is set forth in the complaint, as the foundation of the plaintiff's claim, permits the defendant to counter-claim a cause of action arising out of the same contract."

At the first view, this would seem to provide for a case also covered by the second sub-division. But a moment's reflection suggests, that we had, when the Code was enacted, been familiar with a class of actions in which, though a contract was the sub-

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stantial foundation of the plaintiff's claim, the action was not brought on the contract, but on the duty which the law created. Actions, which were formerly called *ex delicto quasi ex contractu*, were of this class: *e. g.* actions on the case against common carriers, or against inn-keepers, in which the plaintiff might declare, on the contract, in the form of *assumpsit*, or on the duty, in the form of case *ex delicto*.

And other actions on the case may, perhaps, furnish examples that would illustrate what is meant by the clause above recited: *e. g.* an action on the case for a false warranty—a form of action formerly used instead of declaring on the warranty as a contract.

In these and similar cases, it may not be altogether inaccurate to say, that a contract may be the foundation of the plaintiff's claim, although the *action* does not arise *on* the contract.

And in all such cases, a counter-claim, whether it be a cause of action legal or equitable, arising out of the same contract, may be set up by the defendant.

2d. But, secondly, the subdivision authorizes, in actions in which a transaction, not being a contract, is set forth as the foundation of the plaintiffs' claim, counter-claims which arise out of the same transaction. This, we think, includes the case before us. What other legal or equitable counter-claims it also includes, it is unnecessary now to inquire.

The "transaction" here in question, may either include the history of the bills of exchange in question, so far as the title of the plaintiffs or defendants depends upon that history, or the "transaction" may, perhaps, be confined to the manner and circumstances of the transfer to the defendants.

In the first view of the meaning of that word, "the transaction set forth in this complaint as the foundation of the plaintiffs' claim," consists of those facts which are alleged as showing the plaintiffs' title to the bills; their delivery by the plaintiffs for a special purpose, to the Trust Company; the transfer by the Trust Company to the defendants; and their assertion of right to detain, or their actual detention thereof.

All these concur to establish the defendants' counter-claim, and are an essential part thereof. In a just sense, the counter-claim arises out of them.

The difference between the parties consists, not in a denial by

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the defendants that the transaction relied upon by the plaintiffs took place; but both admit, and in fact assert, that it occurred. One of the parties connects with it certain particulars, which, if established, establish the plaintiffs' right to recover the bills or their value. The other connects with the transaction certain other particulars, which, if established, not only refute the plaintiffs' claim, but establish the defendants' right to recover from the plaintiffs the amount of the bills.

The parties differ about the accessory facts only, and when upon the trial, the very truth of the matter is ascertained, the actual transaction (which the plaintiffs set forth as the foundation of their claim, and which the defendants set forth as that out of which their claim arises,) will be developed, and one or the other will be seen to be, by reason of that transaction, entitled.

The transaction is then single and entire, and it is either a just foundation of the plaintiffs' claim, or it entitles the defendants to what they claim from the plaintiffs.

The particulars about which the parties now differ, modify the legal effect which the leading facts will have upon the rights of the parties, and point the transaction favorably to the one or to the other. Some facts enter into the plaintiffs' case, which, of course, do not enter into the defendants' case, and *vice versa*. But from the nature of the subject, this must always be so. The Legislature were not so absurd as to mean that the defendant might counter-claim, when the very facts alleged by him, with all their particulars, were identical with those alleged by the plaintiff. For if to constitute his counter-claim, no other facts or particulars were necessary than the plaintiff had himself stated, there would be no occasion for the defendant to answer at all. He should go to trial on the complaint itself.

If, therefore, the transaction set forth in the complaint of the plaintiffs as the foundation of the plaintiffs' claim be here regarded as embracing the history of the bills, their drawing, transfer to the plaintiffs, their endorsement to the Trust Company, and the transfer by the latter to the defendants, then the defendants' counter-claim arises out of the same transaction. Each party, however, insisting upon certain accessory facts or particulars which make the transaction create a right in the one or the other, as the case may be. And when the actual transaction finally ap-

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pears, then it will be certain that this same transaction is either a legal foundation for the plaintiffs' claim, or out of it arises a cause of action in favor of the defendants against the plaintiffs.

So, if the transaction set forth as the foundation of the plaintiffs' claim, be regarded as more narrow, and as being the transfer of the bills by the Trust Company to the defendants, then, as before, the defendants' counter-claim arises out of the same transaction, to wit, that transfer.

The circumstance, that the defendants have to superadd an allegation of demand, protest, and notice to the plaintiffs, as endorsers, does not alter the case. This added fact is only a means of showing how the defendants' cause of action arises out of the transaction relied upon, and is made complete or consummate.

3d. If it were more doubtful than it seems to us to be, that the counter-claim in this case arises out of the same transaction on which the plaintiffs' claim is founded, we should still think it clear that the defendants' counter-claim might be set up. The third clause in the analysis above made of the first sub-division of the 150th section of the code, very clearly allows it.

The present is a case in which the counter-claim is directly and immediately "connected with the subject of the action."

The subject of the action is either the right to the possession of the bills of exchange in controversy, or it is the bills of exchange themselves. The defendants' counter-claim is not only connected with, but is inseparable from either or both.

The object of the action is damages; but the subject is, the bills of exchange, or the right to their possession. If the plaintiffs show themselves entitled to these bills, they must recover damages. If the defendants show themselves entitled, then they are in a condition to assert their right to have the amount thereof from the plaintiffs. The plaintiffs' claim and the defendants' counter-claim, are, then, connected with the subject matter which is to be enquired into in this action, and the investigation of the subject will determine whether the plaintiffs are entitled to the bills, or to their value as damages; or, the defendants are entitled to hold them, with recourse to the plaintiffs as endorsers.

And this suggests the propriety and wisdom of the provision of the code under consideration, and the reason which induced its enactment. After the question upon which the right of the

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plaintiffs to have these bills of exchange, has been fully investigated and determined in favor of the defendants, there would seem no sensible reason for turning the defendants over to a new suit to recover against these plaintiffs, as endorsers, with all the additional expense and delay which such new action might involve, and in which, also, the title of these defendants might be again put in issue.

It is plausibly argued, that the counter-claims provided for in the first subdivision of section 150, embrace only what was formerly called 'recoupment,' and that recoupment implied an admission of the plaintiffs' claim, and sought an abatement therefrom, either to the extinguishment of a part or the whole thereof. Such was no doubt the character of recoupment; it implied that the plaintiffs' claim was to be allowed, but that another cause of action was to be satisfied out of it. (*Nichols v. Dusenbury*, 2 Com. 286; *Vasseur v. Livingston*, 3 Kern. 257; *Batterman v. Pierce*, 3 Hill, 171.)

But now the definition of counter claim must be considered in connection with section 274 of the code, which authorizes the Court, in the same action, to grant to the defendant any affirmative relief to which he may be entitled.

This opens to the defendant the full right to assert his claim to any relief, legal or equitable, to which upon the facts alleged in his answer he would be entitled had he prosecuted his cross action.

It permits the defendant, therefore, to set up in answer to an action on a note or bond, facts which show not only that he ought not to be required to pay the note or bond sued upon, but that the note or bond ought to be given up to be cancelled; or, in the language of Mr. Jas. Bosworth, in *Gleason v. Moen*, (2 Duer, 642,) it permits the defendant to ask any equitable relief to which he is entitled against a legal demand which formerly could only be had by filing a bill in Chancery; and also the affirmative relief which, in equity suits, could be had only by a cross bill. And for the same reason it must be held to permit the defendant to have relief, in its nature strictly legal, if it arises out of the very matter or subject which the plaintiffs claim brings under investigation. (*Ogden v. Coddington*, 2 E. D. Smith, p. 826-7.)

Again, the right of the plaintiff to claim, and the right of the

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defendant to counter-claim, upon any given or supposed facts in controversy, must, we think, be reciprocal.

Now, suppose the defendants were plaintiffs, setting up their title to the bills of exchange in question, and claiming to recover the amount of these bills from the Xenia Bank, (the present plaintiffs,) as endorsers. It could not for a moment be doubted that the then defendants (the present plaintiffs) could under this same first sub-division of the 150th section, set up in answer the very facts which they have in this complaint alleged and pray as a counter-claim, that these bills be delivered up to them as their own property. Their claim would arise out of the same transaction, and would be connected with the subject of the action.

It seems to us to follow inevitably, that the principle is the same when, as now, the Xenia Bank are prosecuting the defendants. In either case there is one controversy involving the same transaction, and the rights which arise out of that transaction—one contest relating to and connected with the same subject—and it may properly determine the whole right of the parties reciprocally. And we think that it was the intention of the Legislature to permit such settlement of the whole matter in dispute, in one action.

We are, therefore, constrained to say, that whatever doubts have been heretofore expressed upon the question, whether a defendant could set up, as a counter-claim, a cause of action at law, which could not before the Code have been set up in his plea by way of recoupment, those doubts are not warranted.

Our conclusion is, therefore, upon the question which alone was argued upon this appeal, that the defendant was at liberty to set up as a counter-claim, the liability of these plaintiffs as endorsers of the bills of exchange in question, and his title to recover against them as such endorsers.

But for the reasons first above stated, the defence herein demurred to is defective and insufficient, and upon that ground the order appealed from must be reversed, and the demurrer be sustained, with costs of the demurrer at Special Term, to the plaintiffs, to abide the event of the suit, but with leave to the defendants to amend within twenty days—and without costs on this appeal to either party.

Ordered accordingly.

A. & F. MILES v. A. CLARKE.

1. An attorney is disqualified from becoming bail in a civil action.
2. Special bail cannot be treated as a nullity, merely because they are practising attorneys; but that fact is sufficient to require their rejection, if their exclusion is insisted upon.
3. Section 194 of the Code is merely declaratory of the practice in respect to bail, existing at the time the Code was enacted. It prescribes the qualifications essential to sufficient bail, but does not affect the rule by which various classes of persons were disqualified, although residents and freeholders and worth the requisite sum.
4. The rule and its exceptions, are as consistent with each other since, as they were prior to the Code, and § 469 retains the pre-existing practice which is not inconsistent with the provisions of the Code.

(At CHAMBERS, June 14th, 1859; before MONCRIEF, J.)

AN order was made under section 179 of the Code, by which the Sheriff was required to arrest the defendant, and hold him to bail. On being arrested, he executed an undertaking, with two sureties, in the prescribed form. The sureties were excepted to, and notice was given that they would justify. They appeared at the time and place named, and were examined. From their examination, it appeared that they were practising attorneys and counsellors of the court. Thereupon the plaintiffs' counsel insisted, that they should be rejected on that ground. The question, whether attorneys were disqualified from becoming special bail since the Code took effect, was fully argued by the counsel for the respective parties.

Wm. Allen Butler for plaintiffs.

D. P. Hall for defendant.

MONCRIEF, J.—The defendant, having been arrested under one of the subdivisions of § 179 of the Code, tenders an undertaking under § 187. Upon an examination of the sureties, it appears that they are practising attorneys and counsellors of this Court.

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The counsel for the plaintiffs objects to them as disqualified and incompetent on that ground, and (citing 7 Abb. 73; 15 Johns. 535) contends that the bail should be rejected. The note under § 187 of the Code cites authorities as decisive on the point.

Upon a careful examination of all the authorities, it will be found that the practice arose from the rule of the Court of King's Bench, (in 1654, 6 Geo. II. § 1; 1 Henry Blackstone, 76; *Laing v. Cundale*,) whereby "It was ordered by the Lord Chief Justice and the rest of the Justices of that court, that from and after the last day of the (Michaelmas) term, no attorney of that or any other court, or any person practising as such, shall be bail in any suit or action depending in that court." This rule was intended to protect and benefit the attorneys, (and subsequently was extended to their articled clerks.) (Cowp. 828; 2 East, 182.)

Graham, in his practice, (2d edition, p. 80,) says: "attorneys are inadmissible as bail, because of the desire of the courts to protect them from the importunities of their clients," and cites 15 Johns. 535; 1 Wen. 35.

An attorney, becoming bail, could not be treated as a nullity; it was necessary to except to the bail, and oppose it upon the ground that the rule excluded him. (2 East, 181-2; 1 Taunton, 162.)

In 15 Johns. 536, the Court say, "The rule of the Court of King's Bench was cited, and as there appeared to be good reason for the rule, it was approved and adopted; and the attorney in that case was held to be not good bail." (See also 1 Legal Obs. 714.)

It is indisputable that an attorney was not good bail up to the time of the passage of the Code. The same reason still exists to exclude him which led to the adoption of the rule in England, nearly three centuries since, and to its approval and adoption in this State in 1818, (15 Johns.) and the constant recognition thereof, with but one or two recorded instances of attack against its enforcement. While the abstract right of an attorney otherwise qualified to become bail may exist, there may be said to be a greater necessity, at the present time, to continue the rule than at any former period. The hardship it may occasion, in some

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instances, like the present, is more than outweighed by the benefit conferred upon those for whose protection it was created.

§ 194 of the Code, which prescribes the qualifications of bail is, in substance, like the pre-existing rule—and, in my opinion, was designed to be merely declaratory of the established practice, and not to introduce a new rule.

It is quite evident that every person cannot be accepted as bail who is a resident and freeholder, within this State, and worth the requisite amount of property.

A married woman, a minor, or a consul of a foreign government, a plaintiff cannot be required to accept as bail.

It is not an unjust construction of § 194, that it merely declares the affirmative qualifications essential to sufficient bail, without affecting the established practice which disqualifies certain persons from being made bail, against the objection of the plaintiff, although they may, independent of these disqualifying facts, be admissible as bail.

As it is evident that every person who would fully meet all the demands of the mere language of § 194, cannot become bail, it is, in my opinion, a proper construction to hold that there is nothing in it inconsistent with the settled practice which rejected attorneys, officers of the court, and persons permanently or temporarily privileged; and that § 469 retains that practice, and continues it in force.

The objection must, therefore, be sustained, and the sureties rejected as not good bail.



I N D E X.



ACCOUNT RENDERED.

Vide PARTNERSHIP, 2.

ACTION.

1. When a vessel along side of a public pier in the city of New York, is, accidentally, and without fault of her owner, burned, and sinks to the bottom, near the mouth of the slip or basin, thereby so obstructing the slip and bulkhead as to prevent other vessels coming in; those entitled to the alipage, or wharfage, cannot recover for the loss thereof, caused by such obstruction, from the owner of such vessel, without showing that such owner, by due care and attention, could have removed the wreck, or, at least, have shifted its position so as to prevent its being a cause of injury, and that he is in default for not having done so.

Held, that the allegations of the complaint in this action did not show any such ability on the part of the owner, or any such default. *Taylor v. Atlantic Mut. Ins. Co.* 106

2. *Held*, also, that an insurance company, which had insured an undivided interest in such vessel, and had accepted an abandonment made by such insured owner, after the vessel was so burned and sunk, was not liable for loss of alipage, or wharfage, caused by such obstruction, it not being alleged that, by due care and attention, it could be removed. id

3. Such piers and bulkheads are open to

the common use of the public, for any purposes connected with the loading, unloading, or repairing of vessels, and securing their cargoes, whether in vessels afloat or sunk, not prohibited by statute, or the lawful ordinances of the Common Council. And such a use, when it neither incumbers the bulkhead nor pier, so as to incommodate the loading or unloading of vessels, or the passing or repassing of carts, nor in any way injures the structure itself, gives no right of action to the party entitled to alipage and wharfage. id

4. Hence, a use of the slip in attempting to raise the vessel and recover the property in it, (especially as such attempt was made at the request of the plaintiffs) was held to create no liability to make compensation for such use, as no facts were stated showing such use to be wrongful, or an invasion of the plaintiffs' rights, or a violation of any duty which the defendants owed to them. id
5. Action for making excavations on lots adjoining.

Vide LANDLORD AND TENANT, 1, 2, 3, 4.

6. When an architect undertakes to superintend the erection of a building, which carpenters and masons contract to build and finish according to certain plans and specifications, and to the satisfaction of such architect, and who are to be paid in instalments as the work progresses and on production of the architect's certificates that they have become entitled thereto, such architect, to entitle himself to demand the compensation agreed to be paid for his services, must bestow such care and atten-

- tion that the carpenters and masons will not make any material variations from the plans and specifications, which ordinary care and attention, when bestowed by a competent architect, would detect and prevent, or detect in time to be remedied. *Peterson v. Rawson*, 234.
7. If he fail to bestow such care and attention, and in consequence thereof the building is not constructed according to the contract, and damage to his employer results, he loses his claim to compensation, notwithstanding an action will lie, at the suit of his employer, against the contractor, to recover the damages; and although his employer may have settled with such contractors, in full, after the architect had refused to give them the certificates which the contract required as a condition to their right to be paid. *id.*
8. The architect, on the evidence given, having failed to bestow such care and attention, and the building having been defectively constructed, in consequence of such neglect, the judgment entered, on the report of a referee, finding that he was entitled to full payment, reversed, and a new trial granted. *id.*
9. When two persons agree to unite in prosecuting a trading adventure, at their equal profit and loss, and, with a view thereto, one agrees to sell and convey, at its cost to him, one half of a vessel to the other, and, by fraud, procures a settlement of the adventure, by which he is allowed a sum much larger than such cost price, as being its true and actual price, the defrauded party, on allegation and proof of the fraud, may recover back the excess so paid; and such a cause of action is assignable, so that the assignee can, under the Code, sue in his own name. *Sheldon v. Wood*, 267.
10. So if, in such settlement, one fraudulently procures the allowance to himself, as, and for, the cost of goods purchased for such joint adventure, a sum greater than the price paid by him for such goods, the defrauded party is entitled to open the settlement, and recover the amount which, upon a rectification of the erroneous charges, may be due to him, and such a cause of action is assignable. *id.*
11. The twenty-second of the Articles of the Knickerbocker Building Association provides, that "in case any member, by reason of sickness or removal from the city, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of trustees are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party, into the association, shall be returned." *Wetterwyl v. Knickerbocker Building Association*, 281.
12. A member of this association who has given notice, in due form, of his intention to withdraw on the ground that he was "no longer able to continue the payment of his subscription to the said association, owing to various misfortunes, losses in business, sickness in his family, and the rigor of the times," in an action to recover back the money paid by him to the association, should be permitted to prove the truth of said alleged grounds for withdrawing, they having been set forth in his complaint, and denied by the answer. *id.*
13. If he proves, that, owing to such causes, he was totally unable to continue the payment of his subscription, and that there was nothing in the pecuniary circumstances or condition of the association, furnishing any reason why the money paid to it by him should not be returned, he may recover it back, although the board of trustees may not have declared themselves satisfied as to the grounds of his withdrawal. *id.*
14. It is not an indispensable condition to a member's right to withdraw, and to a return of his money, that, under any and all circumstances, the board of trustees shall declare themselves satisfied as to the grounds of his withdrawal. They have no right to withhold that declaration, arbitrarily, when no ground exists, or can be suggested, for withholding it. *id.*
15. It was, therefore, error to exclude evidence of the truth of the grounds alleged by the plaintiff for his withdrawing, and to order a nonsuit, on the

ground that in no event and under no circumstances, could the plaintiff recover without proving that the board of trustees declared that they were satisfied as to the grounds of his withdrawal. *id.*

Vide **AGREEMENT**, 1-5, 8, 9.

AWARD, 2.
BANK CHECK, 1-3.
CARRIERS, 1-5.
CORPORATION, 1, 2.
FRAUDS, STATUTE OF.
JUDGMENT OF COURT OF ANOTHER STATE.
LANDLORD AND TENANT, 1-4.
MORTGAGE OF CHATTELLA, 4.
NEGLIGENCE, 1-14.
PARTNERS, 1, 2, 4, 5.
PLEADINGS, 2—Complaint, 1.
SALE,
TAXES, 1, 5.
VEHICLES, (Joint owners of,) 1-6.

AFFIDAVITS.

The unnecessary entitling thereof may be disregarded.

Vide **DEPOSITION**, 3, 4.

AGENTS.

Vide **FACTORS and AGENTS**,
PRINCIPAL and AGENT.

AGREEMENT.

Morris and others agreed, with the Harlem Railroad Company, to construct an extension of their road from Dover Plains to Chatham Four Corners, for certificates of indebtedness, amounting to \$2,000,000, with interest warrants attached, payable out of a fund to arise from operating the extension; the surplus of its earnings, after paying its expenses, to be applied to paying the interest warrants semi-annually; and the company covenanted, that if the net earnings of the extension were not enough to pay the interest warrants, as they fell due, to "apply the gross receipts from the business over the present road, from and to stations thereon,

to and from stations on," the extension, "so far as the same may be necessary for the payment of interest, to an amount not exceeding three-quarters of such gross receipts." *Knapp v. New York and Harlem Railroad Co.* 297

1. *Held*, that by the true meaning of the contract (there being no net earnings of the extension, but on the contrary, the expenses of running the extension exceeding its earnings), that the three-quarters of such gross receipts must be applied directly and solely to pay such interest warrants, and not to defray the expenses of running the extension, which its earnings were insufficient to satisfy. *id.*

2. *Held*, also, that the facts, that the company had settled with the certificate-holders, semi-annually, during a period of some three years, on the assumption that such gross receipts, to the extent of three-quarters thereof, were to be applied with the earnings of the extension, to pay its expenses, and only the surplus thus arising was to be applied to the payment of the interest warrants, and deferred warrants were issued for the residue, was no answer to an action to have the contract enforced according to its true meaning, as the company, by thus settling, had not paid so much as it was their legal duty to pay, and had not done, or engaged to do, any other act to their prejudice. *id.*

3. *Held*, also, that such settlements did not amount to a contemporaneous, or continuing practical construction of the contract, by which the certificate-holders were concluded, nor one which the Court was equitably bound to adopt or enforce, as they did not appear to have been made with knowledge of the particular facts of the case, or under such circumstances as to establish that such was, in fact, their view of the actual meaning of the contract, or that such was the view of the contractors, to whom the certificates were originally issued. *id.*

4. *Held*, also, that it was competent for the company, by an agreement between them and such contractors, made while the latter held such certificates, to become purchasers and owners of a part

of such certificates, without the purchase of them by the company being treated as a satisfaction and payment thereof, in any such sense as that the holders of the residue of those originally issued, would be entitled to the whole fund, for the payment of the interest warrants on their certificates, if required to make an amount sufficient to satisfy the same. *id.*

5. Held, also, that the company, by the true construction of the contract, were not personally liable for the payment of the certificates, and were only liable for the performance of the covenants on their part in relation to operating the extension and applying its net earnings, and doing other things, as in their contract they had covenanted and agreed to do. *id.*
Cary v. New York and Harlem R. R. Co. *id.*

6. When the written terms of a sale of a lease of real estate for a period of fifteen years are, that "the lessee will pay the auctioneer his fee of \$10, for each year, being \$150, in cash, this day," and the person purchasing, at the time of such purchase, signs a paper-writing, (at the foot of such written terms,) which states, that he has leased such real estate for the sum of \$8150 per annum, and "agrees to comply with the terms above set forth;" the auctioneer, (a lease of the premises having been made to, and accepted by such purchaser,) may maintain an action in his own name, against the purchaser, to recover such fees. *Muller v. Maxwell,* 355

7. The purchaser, in such a case, by force of the terms of sale, and of his agreement to comply therewith, promises to pay the auctioneer's fees directly to the auctioneer. The grant of the lease to the purchaser, and his acceptance of it, are a sufficient consideration for the promise. The auctioneer is the actual party in interest, as promisee, and alone entitled to receive the fees, and may sue, in his own name, to recover them. *id.*

8. In an action upon a contract, by which the plaintiff covenants "to improve machinery for manufacturing gas, and to obtain a patent or patents therefor, and to assign to the defendant one un-

divided half of said patent or patents," and by which the defendant covenants "to pay the plaintiff \$1000 when the patent or patents are issued;" which action is brought to recover the \$1000, after the plaintiff has obtained a patent for an alleged improvement, and assigned an undivided half of it to the defendant; it is competent for the defendant to allege in his answer, and prove at the trial, "that the alleged improvement in said patent was worthless, had never been reduced to practice, and had been known, and tried, and abandoned as worthless, before the patent was issued to plaintiff." *McDonald v. Foggy,* 337

9. Held, that the rejection of such evidence entitled the defendant to a new trial, he having excepted to its rejection. *id.*

Vide CORPORATION, 3-5.

- FRAUD, STATUTE OF, 1-9.
- LAW.
- MORTGAGE OF CHATTELS, 2-6.
- NEW YORK CITY, 1-5.
- RESCISSION (BY INFANT.) INFANT, 1-6.
- PRACTICE, 17—Parties, 3-6.
- SALE,
- SPECIFIC PERFORMANCE, 1-14.
- VEHICLES, 4-10.

AMENDMENT.

Vide PRACTICE 1—Amendment.

ANSWER.

Vide PLEADINGS 1—Answer.

APPEAL.

1. The Court, at General Term, on an appeal from a judgment rendered at Special Term, or entered on the report of a referee, cannot look into the question, whether a previous order, requiring the defendant to be arrested and held to bail in the action, was properly granted. *Ross v. West,* 360

2. Certain objections not taken at the trial deemed waived, and cannot be raised on appeal. *Depositions* 5, 6, 7.

Vide FRAUD, 2.

PRACTICE 2—Appeal.

“ 10—Hearing at General Term.

“ 17—Parties 1.

APPURTENANCES.

Vide RIGHT OF WAY.

ARCHITECT.

Negligence in Superintending the Erection of a Building (*Action* 6-8), p. 234.

ARREST.

Vide APPEAL 1.

ASSESSMENTS.

See TAXES, Apportionment of.

ASSIGNMENT.

1. Of moneys on deposit in Bank. *Vide DEBTOR AND CREDITOR*, 3.
2. What cause of action may be assigned. *Vide ACTION*, 10.
3. *Vide PARTNERS*, 2, 3.

ATTACHMENT.

See VESAKLA.
PLEADINGS, 2—Complaint.

Bond for discharge of attachment, complaint thereon, p. 680.

ATTORNEY.

Amending Name in Summons after Judgment, p. 678.
Not competent to become bail, p. 709.

AUCTIONEERS.

1. Where goods—in bond in the U. S. warehouse, the duty being unpaid—were sold by the defendants, as auctioneers, and on receiving full payment therefor, they gave to the purchaser an order on the owners, requiring them to deliver the goods; and the purchaser received the order, and then agrees with the owners, that, instead of receiving the goods here, the owners paying the duties, they shall pay to him, and he will receive from them, the amount of the unpaid duties in other merchandise, and that the goods be shipped in bond to New Orleans; and, thereupon, such owners cause the proper entries of the goods to be made at the custom-house for withdrawal and transportation, and give bond that the goods shall not be landed without the payment of the duties: the purchaser cannot afterwards revoke his instructions, and require the auctioneers to deliver the goods here. *Simpson v. Gerard*, 607 *id.*
2. The rule is the same, although the defendants, at the time of the sale, did not disclose the names of their principals. *id.*
3. Nor does it affect the liability of the defendants, that the return duties have not been actually paid by such principals; nor that the goods had not been actually shipped, (in pursuance of the entries for transportation and the giving of the bond,) until after the purchaser declared his desire to revoke his instructions and receive the goods here. *id.*
4. When the purchaser of goods, so sold, accepts an order therefor upon a third person, and makes a new and substituted arrangement, different from, and in lieu of, the original contract, and such third person enters upon the performance of such new contract, the auctioneers are discharged. *id.*
5. Depositing the proceeds of his sales to his own credit in Bank. *Vide DEBTOR AND CREDITOR*, 1, 2, 3.
6. When he may maintain an action in his own name against a purchaser for his commissions. *Vide AGREEMENT*, 6, 7.

AWARD.

1. When the Bond of Submission, by which the parties thereto submit the matters in difference between them to the decision of arbitrators, provides that the award must be in writing, and ready to be delivered on or before the 1st of January, 1848, and the time for the delivery of the award is extended by successive agreements, in writing, signed and sealed by the parties, the last of which is dated the 1st of June, 1850, and by it, it is agreed that "the time for the parties to close their arguments, on the arbitration under the annexed bond, is hereby extended to the 12th day of June instant; and the time for the arbitrators to make and deliver their award, on said bond, is hereby extended to the first Monday of July next." At a meeting of the arbitrators, on the 7th of June, it was agreed by the respective parties, that both parties should close their arguments on the 14th of June; and the counsel for the defendant, one of said parties, summed up on the said 14th of June, and the arbitrators adjourned until the 19th of said June, and then heard the counsel for the other party sum up, against the objection of the defendant thereto, made at the time.

Held, that the arbitrators exceeded their powers, and that their award was void, for that cause. *Cole v. Blunt*, 116

2. The agreement of the parties, as to the time within which the arguments were to be closed, prescribed a limit to the powers of the arbitrators in that respect, and by hearing the argument on the 19th of June, they transcended their authority, and their award is void, however just it may be in principle. *id.*

Vide PLEADINGS 2—Complaint 1.
PRACTICE 2—Appeal 2.
WITNESSES 1.

B.

BAIL.

1. An attorney is disqualified from be-

coming bail in a civil action. *Miles v. Clarke*, 709

2. Special bail cannot be treated as a nullity, merely because they are practising attorneys; but that fact is sufficient to require their rejection, if their exclusion is insisted upon. *id.*

3. Section 194 of the Code is merely declaratory of the practice in respect to bail, existing at the time the Code was enacted. It prescribes the qualifications essential to sufficient bail, but does not effect the rule by which various classes of persons were disqualified, although residents and freeholders, and worth the requisite sum. *id.*

4. The rule and its exceptions, are as consistent with each other since, as they were prior to the Code, and § 469 retains the pre-existing practice which is not inconsistent with the provisions of the Code. *id.*

BANKS.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2.
PRACTICE, 5—Counterclaim, 1.
BANK CHECK, 1-8.

BANK CHECK.

1. A bank which receives from its customer a check drawn by a third person on another bank, and credits to the customer, in its account with him, the amount of such check, as so much cash, is not guilty of laches, by reason of not presenting it to the drawee until the following day, when, in so presenting the check, it acts in conformity to the regular and established course of business in such cases. *Hooker, Prest v. Franklin*, 500

2. Such a depositary bank, by such a transaction, does not undertake to exercise, nor subject itself to the duty of exercising, any greater diligence to obtain payment of the check, than is practised by conforming to the established usage of banks, and the customary course of business in such cases. *id.*

3. Hence, in such a case, the depositor of the check, endorsing it at the time of such deposit, will be liable to the depositary for the amount of it, on its being protested for non-payment when so presented, and being duly notified of such presentment, and of the refusal of the drawee to pay it, although the drawer had funds in the bank on which it was drawn, during some parts of the day of such deposit and subsequently thereto, sufficient to pay it. *id.*
4. Bank check gives no right of action against the bank.

Vide Debtor and Creditor, 3.

BILL OF EXCEPTIONS.

Vide Exceptions.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A note given to a bank by a purchaser of its stock, which the bank owns, is not made illegal and void, by Sub. 3 of § 1 of 1 R. S., Part I, title 2, chap. 18, art. 1. That section applies to an original subscriber for stock, and to the payment of the sum so subscribed. *United States Trust Co. v. Harris,* 75
2. The portion of the capital stock of a bank which the bank owns by virtue of a purchase of it, it may sell on credit, and a note is not void merely because it was given to the bank on such sale, for the contract price of the stock, nor because it was discounted by the bank to enable such purchaser to pay for the stock so bought. *id.*
3. A notice to the endorser of a note, dated on the day such note matures, stating, that a note made by the actual maker thereof, naming him, and the date of the note and its amount, and that it is endorsed by the person to whom such notice is directed; and also stating, that such "note was, on the day that the same became due, duly protested for non-payment, and that the holders look to you for the payment thereof," is sufficient to charge such endorser, unless it is made to appear that

he was the endorser of other notes, then outstanding, made by the same maker, of the same date, and for the same amount. *Cook v. Litchfield,* 137

4. When, in such a case, a notice, which is sufficient in the absence of proof of any such extrinsic facts, is, by such proof, rendered defective, by reason of not being sufficiently full in its description of identifying particulars, the plaintiff may prove other extrinsic facts existing and known to such endorser at the time of his receipt of the notice; and if, on construing the notice in the light of all such extrinsic facts, there can be no reasonable doubt, that the endorser knew that the notice related to the note maturing on the day of the date of such notice, it will be held sufficient. *id.*
5. If there be a conflict of evidence, as to the existence of the alleged extrinsic facts, or as to the defendant's knowledge of them, the questions of fact must be determined by the jury. *id.*
6. When there is no conflict of evidence, as to either of those facts, the sufficiency of the notice is to be determined by the Court. *id.*
7. When a note is made, without consideration, and for the accommodation of the payee, and is delivered to him by the maker, without any restriction as to its use, and is endorsed and delivered by the payee to the holder, as security for an antecedent debt, the latter can recover of the maker, at least, to the amount of the debt it was transferred to secure. It is no answer to an action, on such note, that the debt it was transferred to secure has not become due. If such debt has been paid, the burden of proving that fact rests on the maker of the note. *Robbins v. Richardson,* 248
8. A surrender of other securities, by the endorsee of such a note, as a consideration of the endorsement and transfer of it by the payee, makes the endorsee a holder for value. *id.*
9. When such endorsee, prior to his taking the note, sends it by a messenger to the maker, with instructions to inquire if it is a business note, and the

inquiry is made, and he answers that it is; after proof of such facts, the endorsee may prove that the messenger, on returning, reported to the endorsee what the maker said, by any person who heard him make such report. Proof of the latter fact is material, to show that the representation made or answer given, was communicated to the endorsee before he took the note, and such proof may be made by any person who knows the fact. *id.*

10. When the holder of a bill of exchange, which has been accepted for the accommodation of the drawer, and has been entrusted to such holder to be negotiated by him for the benefit of such drawer, endorses and delivers it as security for his own performance of a contract which he employs his immediate endorsee to make, and such endorsee transfers it to a third person, the latter cannot recover against such prior holder and endorser without proof that the immediate endorsee of the latter has some unsatisfied claim which it was endorsed to secure, or that the plaintiff took it in good faith, before maturity, for value paid. *Woodruff v. Wicker*, 618

11. When, on the trial of such an action, it appears that the plaintiff's immediate endorser (if himself the plaintiff) could not recover, because nothing is due to him, or because he has no demand against the defendant—enough is shown to establish that the transfer to the plaintiff will operate as a fraud upon the defendant, as between him and his immediate endorsee, if the plaintiff is permitted to recover. *id.*

12. An endorsee, who is obliged to prove that a note or bill was endorsed to him, *done sds*, and for value, before its maturity, in order to maintain his action, must prove, more than that the note or bill was seen "in a batch of other notes in a place where the plaintiff usually kept his securities," and the belief of the person seeing it there, that the plaintiff had advanced on the credit of that and other collaterals more than the amount of such bill. *id.*

13. In an action in the nature of trover, brought by an endorser to recover the value of bills of exchange from an endorsee, the latter may affirm his own

title, and counter-claim the amount of the bills against such endorser, the plaintiff. *Xenia Branch Bank v. Lee*, 694

Vide *ESTOPPEL*, 1, 2.
INFANT, 1-6.
PRACTICE, 5—Counter-claim, 1-5.
" 17—Parties, 3-6.
VENDOR AND PURCHASER, 1.

BOND.

STATUTORY. Complaint thereon, p. 680

BOOKS AND PAPERS.

Vide *DISCOVERY OF BOOKS AND PAPERS*.

BUILDING ASSOCIATION.

Vide *Action*, 11-15.

C

CARRIERS.

1. A city express company, engaged in carrying parcels between the City of New York and Brooklyn, and in carrying the trunks of travellers to and from the passenger depots of the various railroads, are common carriers, and perform their duties under the responsibilities of common carriers. *Richards v. Westcott*, 589

2. Where such a company is employed to carry a traveller's trunk to a passenger depot, and, by mistake, it is wrongly delivered; and, being recovered, it is forwarded to the traveller's destination, but is found to have been opened, and a portion of its contents stolen: the company are not liable to a third person for a box of jewelry belonging to him, which the traveller had, as agent for such third person, packed in his trunk, and which he was intending to dispose of as merchandise. *id.*

3. A common carrier is entitled to protection against liability, sought to be thrown upon him, by concealment or

fraud, which he would not otherwise have assumed; and no one has a right, by any concealment or artifice, to disarm him of that vigilance, which the nature and extent of the danger reasonably demands; or to deprive him of the increased compensation which a more hazardous or responsible service justly entitles him to receive. *id.*

4. He is not, therefore, when engaged in carrying a traveller's trunk containing the traveller's wearing apparel and equipments, presented to him and paid for as ordinary travelling baggage, liable for the loss of a box of jewelry, put up for sale as merchandise, and packed in such trunk. *id.*

Vide Negligence, 1-14.

CASES COMMENTED ON.

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| 1. <i>Freeman v. Orser</i> , 5 Duer, 476, etc. | |
| <i>Burger v. White</i> , | 92 |
| 2. <i>Cook v. Litchfield</i> , 5 Seld. 287, etc. | |
| <i>Cook v. Litchfield</i> , | 187 |

CHECK.

Vide BANK CHECK.

CLEARING HOUSE.

It is not negligence in a bank with whom checks are deposited to send them in regular course of business through the clearing house. *Hooke, Prest. v. Franklin*, 500

CODE—CONSTRUCTION OF.

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| § 113. Trustee of an express trust, p. 471. | |
| § 121. Substitution of Party, p. 690. | |
| § 122. Duty of Court to bring in Parties, p. 272. | |
| §§ 186, 246, 274. Taking judgment by default against one of two joint debtors, p. 678. | |
| §§ 147, 8. When defects are waived, etc., pp. 267, 272, 690. | |
| § 150. Of counter-claim, pp. 75, 287, 694. | |
| §§ 173-4. Of Amendments, pp. 673, 684. | |

B.—II.

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| § 194. Qualifications of Bail, p. 709. | |
| §§ 262-3. Of General and Special Verdict, p. 75. | |
| § 265. Of Verdict subject to opinion of Court, p. 365. | |
| § 332. Notice to limit time to appeal—Time cannot be extended, p. 684. | |
| § 386. Costs, when offer to allow judgment has been given, p. 489. | |
| § 388. Discovery of Books and Papers, p. 669. | |

COMMON CARRIERS.

Vide CARRIERS.

COMPLAINT.

Vide PLAINDES 2—Complaint.

CONTRACT.

Vide AGREEMENT.

CORPORATION.

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| 1. Evidence of the incorporation of a company, under and pursuant to a statute of a sister State, which, such statute declares, shall be deemed sufficient, will be held sufficient, in the courts of this State, to prove the fact of such incorporation, provided that due proof of the existence and contents of such statute shall also be given. (<i>Per Hoffman, J.</i>) <i>Eagle Works v. Churchill</i> , 166 | |
| 2. In an action by a corporation (proved to have been duly created) against a person, upon a contract made by him with such corporation, it cannot be set up, as a defence, that the corporation has been guilty of acts or omissions, which would subject it to a forfeiture of its charter, or proceedings duly instituted for that purpose by the State granting the charter. <i>id.</i> | |
| 3. Where the officers of a corporation do an act in excess of the corporate power, the Corporation is not bound; and when the statute under which the Corporation acts restricts its action to a particular mode, none of the agents through whom the Corporation acts, can bind it | |

in any other than the mode prescribed.
Brady v. The Mayor, &c. 173

4. The officers of the Corporation cannot, therefore, in such a case, bind the Corporation by accepting work done under a void contract, or by confirming an assessment to pay the expense thereof. *id.*
5. Those who deal with a Corporation, the mode of whose action is thus limited, must take notice of the restriction in its charter, and see to it that the contracts on which they rely, are entered into in the manner authorized by the charter. *id.*

COSTA.

Vide PRACTICE, 4.—Costa.

COUNTER-CLAIM.

Vide PRACTICE, 5.—Counter-claim.
VEREKA, 3.

D

DEBTOR AND CREDITOR.

1. When the owner of goods delivers them to an auctioneer to be sold on his account, being, at the time, a clerk and book-keeper of the auctioneer, and the auctioneer, with the knowledge of such owner, and without objection from him, deposits from time to time the proceeds of such sale, and the proceeds of sales for others, and all moneys he receives, to his general credit in bank, and draws, from time to time, against such deposits, checks to pay debts owing to his customers and his general expenses, such owner will be deemed to have assented to that course, and he will become a general creditor of the auctioneer, having such rights as the other general creditors, and no greater. *Levy v. Cavanagh,* 100

2. A receiver of the property of such auctioneer, duly appointed, in proceedings against him supplementary to execution, will, as such, be vested with

the legal title to the moneys on deposit, and be entitled to payment of them by the bank, in preference to the creditors owning the goods, the proceeds of which have been so deposited. *id.*

3. A check drawn by such auctioneer, in favor of such owner, on such bank, for the amount of the proceeds of his goods, after such appointment of the receiver has been perfected, and notice thereof given to the bank, and an assignment of an amount of such deposit equal to the amount of such check, will give such owner no right of action against the bank, nor any right to the moneys on deposit, they having been paid into court, to abide the result of a suit to determine the relative right of such owner, and of such receiver to them. *id.*

4. When such owner, in an action against the receiver to enforce his claim to, and to recover such moneys, as part of the case made by his complaint, states the drawing of the check, and the making of such assignment, and a demand of the moneys by virtue thereof, and proves such facts by such assignor on the trial, is the plaintiff in the judgment on which and for whose benefit such receiver was appointed, admissible as a witness, in such action, for such receiver? *id.*

DEED.

CONVEYANCE—Reserving one-half of wall to be erected on premises conveyed.

p. 685

Vide RIGHT OF WAY.
PARTY WALL.

DEFENCE.

Vide CORPORATION, 2.
AGREEMENT, 8.
JUDGMENT OF A COURT OF ANOTHER STATE.

DEPOSITIONS.

1. On the 18th of March, 1853, on a trial

in the City of New York, commenced before referees in December, 1851, and adjourned from time to time till that day, the deposition of a witness residing in Buffalo was offered in evidence by the plaintiff. The evidence of the inability of the witness to attend, was the testimony of his son, to the effect, that, "he was in the city in April, 1852, to be a witness in this case; that he was then in feeble health, and was detained at Utica by sickness on his journey home, and that he was here again in September, 1852, in the hope that it would benefit his health; that he returned home much weaker, and, since, has been unable to make a journey; that his complaint is consumption; that a week prior to said 18th of March, when the son left Buffalo, the witness was very feeble, unable to get out of his house, or to sit up all day, and that the family scarcely expected him to live, from week to week;"—and, without disposing of the question, the referees adjourned to the 10th of May, 1853, when the deposition was again offered, and received against the objection, "that the evidence of the witness's inability to attend, is insufficient."

Held, that the evidence on that point was sufficient to entitle it to be read on the day it was first offered, and proved sufficiently, from the nature, extent, and duration of the illness of the witness, his inability to attend on the 10th of May, when it was finally offered and received. *Sheldon v. Wood*, 267

2. When, under a statute authorizing the deposition of a witness to be taken before a Judge out of Court, and which requires that the deposition "shall be carefully read to, and subscribed by, the witness," the Judge taking it certifies that "it was read to the witness," the deposition will not be excluded at the trial because the certificate does not state that it was "carefully" read. The Court will presume, under such circumstances, that the officer performed the duty properly, which the statute enjoins, before he made his certificate.

Under 2 R. S. p. 398, art. v., entitled, "Of Proceedings to Perpetuate Testimony," a Judge of the Supreme Court may order a deposition to be taken before the County Judge of Erie County, in

an action pending in this Court, the witness to be so examined then residing in that county. Such County Judge could have made the order, on an application to him therefor. *id.*

3. The fact that the affidavit on which the order was made is entitled in the Supreme Court, does not make the order and the deposition taken under it, nullities, if the affidavit correctly describes the Court in which the action was pending, in which it was designed to be read, and is sufficient in other respects. *id.*
4. This part of the title, and similar matter in the title of the deposition, may be rejected as surplusage, being unnecessary and immaterial. *id.*
5. The objection that portions of a deposition are hear-say evidence, cannot be raised on appeal, if not taken at the trial. So of objections to the admissibility of a deposition, when none were made on the trial. *id.*
6. When particular objections are made to the reading of a deposition, and properly overruled, the party taking them cannot start other objections on the argument of the appeal, if of such a nature that they might have been obviated, if taken at the trial. *id.*
7. So, when, on the trial, the party sufficiently proved the absence of a witness, whose deposition he offered to read, and the adverse party objected, generally, to the reading of the deposition, without stating any ground of objection, and the referees adjourned without deciding the question, and, on the adjourned day, the deposition being produced, the general objection was renewed and overruled, the party objecting cannot, on the argument of the appeal, start the specific objection, that, for aught that was shown on the adjourned day the witness may have returned to the city, when it is obvious that no such ground of objection was intimated on the trial, and the question of admissibility was treated by the parties, as well as by the referees, as standing precisely as it did when it was raised. *id.*
8. If, in taking depositions, *de bono esse*.

or under a commission, there be defects in the mere form of the officer's certificate, which can be remedied on a return of the deposition, or of the commission and deposition, to him to be corrected, or if there be other defects of form, which can be remedied by re-examining the witness, a party intending to object, on the ground of such defects, must move to suppress the deposition, if there be ample time, before the trial; and, if he fail to do so, they will be disregarded, if not made until the trial. *id.*

DISCOVERY OF BOOKS AND PAPERS.

1. An order, requiring the plaintiff to produce, or give copies of, papers, to enable the defendant to answer the complaint, will not be made when it is manifest that the defendant has no defence, which he cannot set up in due legal form, to raise the proper issues, without the aid of such papers. *Mora v. McCredy, et al.* 669
2. Discovery may be ordered, to assist the defendant to facts, without which he cannot frame an answer which will protect his rights in the action itself; but the object for which discovery will be ordered, is not to prevent a defendant from answering untruthfully. *id.*
3. It may be very much desired by a defendant to know, before he answers, what facts the plaintiff may be able to prove, and what admissions or evidence, statements and accounts rendered by him to the plaintiff may contain; and such knowledge might, perhaps, serve as a useful precaution, admonishing the defendant what he may not, with safety to his reputation, aver or deny; but such considerations are no reasons for compelling a discovery, to enable the defendant to answer. *id.*

DOWER.

1. A widow is entitled to dower, in an equity of redemption vested in her

husband, in lands conveyed to him during the coverture, subject to a mortgage thereon. *Wheeler v. Morris,*

524

2. Her inchoate right of dower will not be defeated or extinguished by the foreclosure of the mortgage, during the life-time of her husband, if she is not made a party to the suit, notwithstanding her husband is made a defendant therein. *id.*
3. In the State of New York, when a mortgage is given by the purchaser of lands to his grantor, to secure to the latter the payment of the purchase-money, or a portion thereof, it is not necessary that the wife of the purchaser should join in the mortgage. As against such a mortgagee, the wife's right of dower, is in subordination to the mortgage, and cannot be set up to impair the mortgage, or the lien thereof. If, therefore, she survives her husband, she cannot claim dower in hostility to the mortgage, nor except on a full recognition of the mortgage lien. But she, nevertheless, is entitled to dower in the equity of redemption, and is entitled to redeem the premises from the mortgage. *id.*
4. In this respect, the widow of one who has given a mortgage for purchase-money, in which she did not join, is in the same situation, and has the same rights, as the widow who has united with her husband in giving a mortgage to secure some other debt; and as the widow of one who had mortgaged his lands before his marriage; and the same, also, as the widow of one who purchased land subject to a mortgage, and died. *id.*
5. If a purchaser, who has given a mortgage for purchase-money, conveys the premises to another, subject to the mortgage, the same propositions, above stated, apply; the wife of the last grantee has an inchoate right to dower in the equity of redemption, in subordination to the mortgage, and on the death of her husband she becomes entitled to dower, and may redeem the premises by payment of the mortgage debt. *id.*
6. A foreclosure of the mortgage in the life-time of her husband, by a suit to

which he is a defendant, will not defeat, nor cut off her right to redeem if she is not also a party. *id.*

7. The mortgagee in lawful possession, and those who may have acquired title by such a foreclosure, and a sale therein, and are in possession, may defend such possession at law against the claim of the widow; they have the legal title, and her claim is subordinate thereto, so long as the mortgage debt is unpaid; but she is entitled to redeem, and a suit in equity may be maintained by her, to be allowed to redeem upon such terms as may be equitable. *id.*

8. The Statutes of New York relating to dower, etc., bearing upon these questions examined and considered. *id.*

Vide **Widow.**

E

EASEMENT.

Vide **RIGHT OF WAY.**

ESTOPPEL, IN PAIR.

1. When the endorsee of a note, prior to his taking the note, inquires of the maker whether it is a business note, and such maker answers that it is, and the endorsee receives the note, and gives value, or parts with securities, in reliance upon such representation, he is entitled to treat it, for all purposes, to the extent of his interest therein, as a business note, and hold the maker to the truth of his representations. *Robbins v. Richardson*, 248

2. Whether, if he so receive the note, as collateral security for the debt of the payee, the maker would be permitted to deny the truth of such representations, even to reduce the recovery to the amount of the debt for which it is held as security? *Quare.* *id.*

Vide **AGREEMENT**, 2, 8.

EVIDENCE.

1. Parol evidence of the contents of a letter may be given, after proving it in the defendant's possession, and proper service of a notice on him to produce it, and his refusal to do so. *Sheldon v. Wood*, 287

2. The defendant, in his answer, having alleged, and having given evidence tending to show that a house and lot conveyed to him by the plaintiff's assignor, in part payment for a vessel, was fraudulently over-estimated and misrepresented to him, to his damage, evidence, by the plaintiff, of its actual cost, at a period shortly anterior, is admissible, on the question of fraudulent over-valuation. *id.*

3. So, proof of the market value of the vessel was admissible, as an item of evidence, the defendant alleging, and having given evidence with a view to prove, that her market value was equal to the sum at which he had sold her. *id.*

4. When a case, on appeal, states, that an entry in a book was offered to be proved, and the counsel "agreed, that the entry shall be considered proven as stated, and, if admissible, shall be received when passed upon by the referee, and that the counsel for the defendant have his proper exceptions to the entry," and this is all that the case discloses in relation to it, it will be presumed, that the referee were not subsequently asked to rule in respect to the matter, and the entry will not be treated as being a part of the evidence given on the trial. *id.*

5. In an action brought by the widow to recover from the heir-at-law, etc., his just share of taxes and assessments paid by her, it is not competent to read in evidence an affidavit of one of the commissioners, by whom the measurement of her dower was made, to show that the commissioners took into consideration the taxes which would probably be imposed upon the particular dwelling-house in question, and assigned her dower in that house on the assumption that she would pay the whole of the taxes; nor to prove by that or by other evidence, that

upon any other assumption there was assigned to her for her dower an under-proportion of her husband's real estate. *Graham v. Dunigan*, 516 Such an affidavit, although found on file annexed to the record of the proceedings for the admeasurement of dower, forms no proper part of the record. *id.*

6. If the commissioners made the admeasurement upon any erroneous principle or assumption, the heir-at-law, etc., should set it aside by the proper direct impeachment thereof in the proceeding itself. *id.*

Vide AGREEMENT, 8, 9.
BILLS OF EXCHANGE, etc., 9.
CORPORATION, 1, 2.
DEPOSITION, 1, 8.
ESTOPPEL, 1, 2.
FRAUD, 1.
JUDGMENT IN A COURT OF
ANOTHER STATE.
LANDLORD AND TENANT, 7-11.
PRACTICE, 5.—Counter-claim.
“ 22.—Trial, 8, 4.

EXCEPTIONS.

1. It is no ground for setting aside a verdict that the Court submitted to the jury a question which it was the duty of the Court to decide, if the jury have found as the Court should have decided. *Cook v. Litchfield*, 137
2. Where it is stated in the case that a witness named was sworn and examined "under objection and exception by the defendant's counsel," the Court on appeal will only consider whether the witness was, upon the facts appearing in the case, a competent witness for the plaintiff. Such an objection and exception does not bring under examination the particular testimony given by the witness, not further objected to, nor any part of it, if any of such testimony was admissible. *Graham v. Dunigan*, 516

Vide EVIDENCE, 4.

EXPRESS COMPANY.

Vide CARRIERS.

F

FACTORS OR AGENTS.

1. By the rules of the common law, a factor, to whom goods are consigned for sale, has no authority to pledge them. *Bonito v. Mosquera*, 401
2. If without an express authority, he pledges, as owner, the goods or the documents of title entrusted to him, he is guilty of a violation of his trust, although the moneys raised by him are applied to the use of his principal; and such a pledging, as tortious and void, passes no title, and can create no lien. *id.*
3. On the contrary, such an act gives to the owner an immediate right of action for the recovery of the goods, or of their value, against the innocent pledgee, who is not allowed either to bar a recovery or reduce its amount, by any inquiry into the state of the accounts between the plaintiff and his unfaithful agent. *id.*
4. The contracts with a factor or agent, which, although void at common law, are rendered valid by the provisions of the third section of the New York Factors' Act, (Session Laws of 1830, chap. 179, 3 R. S., 5th ed., p. 76,) belong to two classes: first, where the transaction is founded on the documentary evidence of title mentioned in that statute; second, where it rests exclusively on the factor's possession of the goods; that possession being the sole evidence of his ownership. *id.*
5. As to the first class, the documents of title specified in the statute are: 1st, a "bill of lading," 2d, a "custom-house permit;" and 3d, a "warehouse-keeper's receipt for the delivery of any such merchandise," viz.: the merchandise described in the first and second sections, as shipped from some other port, foreign or domestic. *id.*
6. To render a contract with a factor, made on the faith of either of these documents, valid, as against the owner of the merchandise, it must either appear on the face of the document, that the factor is the owner, or its terms

must be entirely consistent with the supposition that he is so; and the other party to such contract must not have notice, otherwise, that such factor is not the owner. *id.*

7. And such document must not merely be exhibited, but must be transferred and delivered to the person advancing his money or credit in reliance on the ownership which it furnishes; and it must appear, that such document was transferred and delivered when the advance, it was intended to secure, was made. These acts must be simultaneous. *id.*

8. And the effect of this transfer must be either to vest in such person a title to the property, or the exclusive right or means of obtaining the actual possession. *id.*

9. When the Act of 1830 was passed, the only "custom-house permit," known to the law, was that which was granted to a consignee, when the goods mentioned in his invoice and bill of lading had been duly entered at the custom-house, and the duties thereon had been paid or secured to be paid. *id.*

10. The "permit" for the landing of goods, on which the duties are not paid, to the end that they may be stored in a bonded warehouse, as authorized by the Act of Congress, passed August 6, 1846, and the subsequent Act amending the same, is not such a document, or "custom-house permit," as is meant by or provided for, in the New York Factors' Act. *id.*

11. "A warehouse-keeper's receipt," as that phrase is used in the New York Factors' Act, means the receipt of the keeper of a private warehouse, in which the person named in the receipt has deposited the goods for safe keeping; and, by its terms, binds such warehouse keeper, upon the surrender of the receipt, to deliver the goods to the bearer of it, or to the holder of it, if duly endorsed to him. It does not include such a receipt as the keeper of a bonded warehouse, on receiving goods for storage therein, on which the duties are unpaid, is authorized by the Acts of Congress to give. *id.*

12. To render the contract valid, it must also appear that the document transferred, being such as the statute describes, had been entrusted to the factor by the owner of the goods. *id.*

13. To satisfy the word, "entrusted," such document must have been delivered or transmitted by the owner of the merchandise personally, or by his authorized agent; or it must have been obtained by the factor in the proper and ordinary mode of discharging the duties of his trust. *id.*

14. When a factor attempts to pledge the goods of his principal, by the transfer of any document of title not mentioned in the New York Factors' Act, it is, by the rules of the common law, and by those alone, that the validity of the pledge, as against the owner of the goods, must be determined. *id.*

15. The possession of goods by a factor "not having the documentary evidence of title," that can alone enable him to create a pledge valid as against the owner, is an actual, as distinguished from a constructive, possession. *id.*

16. It is only when such is the character of the factor's possession, and only by the transfer and delivery of the goods themselves, that a valid pledge, under this provision in the statute, can be effected. *id.*

17. When goods are shipped by the owner of them from a foreign port, consigned to his factor for sale, and the duties not being paid, they are stored in a bonded warehouse, they are in the actual custody of the collector of the port at which they are landed, and the factor's possession of them is constructive only. That is not such a possession as will enable the factor to make a valid pledge of them, otherwise than by the transfer and delivery of such a document of title as the statute (of 1830) describes. *id.*

18. In all cases, to render the contract valid, the change of possession, whether actual or constructive, must be made at the time of the advance which the pledge is intended to secure. *id.*

19. When the attempt by a factor to pledge the goods of his principal is made to secure a then present advance, if it fail in the requisites to give it validity, under the third section of the New York Factors' Act, it is wholly void—void at the common law, and not within the provisions of the fourth section of that Act. *id.*
20. Under the fourth section of the New York Factors' Act, to render the contract valid, there must be an actual transfer of the goods themselves; or, if the transfer and delivery of a document of title, will, under that section, create a lien upon the goods in favor of the person taking it in deposit to the extent of the factor's claim against the owner, then there must be an actual transfer of the statutory document of title. *id.*
21. The same transfer of possession is necessary under the fourth section, when possession without documentary evidence of title is relied upon, and the documentary evidence of title must be of the same description when documents are relied upon, as is necessary under the third section to give validity to a transfer for a present advance. *id.*
- FALSE REPRESENTATIONS AND FRAUD.**
1. When, in a suit for an accounting, notwithstanding a previous settlement of the same matters, on the ground of fraudulent misrepresentations and over-charges, the referees sustain the action, but, in stating the facts found by them, do not state, in terms, that the representations and over-charges, which they find proved, were fraudulent, the judgment will not be reversed for that cause, if, on all the facts found, the necessary legal conclusion is, that they were fraudulent, or if they would entitle the plaintiff to the relief actually granted, though there was no actual fraudulent intent. *Sheldon v. Wood,* 267
2. When the complaint, in such an action, alleges, generally, the fact of fraudulent over-charges, and specifies some, without professing to specify all, and, on the trial, some not specified in the complaint, are proved, without any objection being taken to such proof or investigation, the Court will not listen to the objection, that such over-charges are not specified in the complaint, if first raised on an appeal from the judgment. *ad.*
3. When, in an action of tort for a false and fraudulent representation, the complainant aver, that the defendants, by means which it minutely details, were "fraudulently and illegally intending, and contriving to dispose of" property, (which purported to be shares of the capital stock of a company duly incorporated, and called "The Gold Hill Mining Company,") "at a false and fictitious value, for their own benefit, as individuals; and to cause it to be generally believed, that the said company possessed capital, or had property to the amount of one million of dollars in all;" . . . "and that shares or interests in said capital were of great value, and a means of profitable traffic and of safe investment;" and that, "by means of the aforesaid false and fraudulent acts, practices, deceits, statements, and representations of the said defendants, it had come to be generally believed in the City of New York, and was believed by the plaintiff, that the said The Gold Hill Mining Company was, in fact, possessed of property of at least one million of dollars in value; and that shares and interests in such capital were of the value of, at least, five dollars per share, (the par value of each share,) and that the said company had, since the organization thereof, earned, over and above its expenses, at least, the sum of \$50,000;" . . . "and so believing, and on the faith and credit of the aforesaid false and fraudulent acts, practices, and representations of the said defendants; of the falsity and fraud whereof the said plaintiff was ignorant; and the said plaintiff did, on the 14th of April, 1854," purchase certificates of said stock, to the extent of 1000 shares, and paid \$3500 therefor, and that the interest acquired by the plaintiff thereby, was worthless; and "that by means of said false, fraudulent, and deceptive acts, practices, and representations of the said defendants, the said plaintiff has sus-

tained damage to the amount of \$6000, for which sum, with the costs of this action, he demands judgment." Such a complaint is, in substance, a good and sufficient pleading, although it does not allege that the plaintiff purchased of the defendants, or by reason of any immediate communication between him and them in relation to such purchase. *Cross v. Sackett*, 617

4. There is, in substance, no difference between an averment, that by means of certain specified frauds of the defendants, (which are charged to have been practiced with intent to defraud the public generally,) the plaintiff was induced to make, and did make, a particular purchase; and an averment, that the defendants, by means of the same frauds, induced the plaintiff to make such purchase. *id.*

5. The averment, in either form, connects the fraud and damage as cause and effect, with sufficient certainty, to comply with all the essentials of a complaint good in substance. *id.*

6. What evidence will be sufficient to warrant the conclusion, that the defendants intended, by the means charged, and did, in fact, thereby fraudulently induce the plaintiff to purchase a thousand shares of such stock, is a question which does not arise on a demurrer to the complaint. *id.*

7. The fraud of the defendants and the injury to the plaintiff being, by the complaint, clearly connected, as cause and effect, and as the demurser admits all the material allegations of the complaint to be true, it follows, that on a demurser to such a complaint, the plaintiff is entitled to judgment. *id.*

"There is no wrong or fraud which the directors of a joint-stock company, incorporated or otherwise, can commit, which cannot be redressed by appropriate and adequate remedies." (Per *Hoffman, J.*) *id.*

"When a party projects, and publicly promulgates the scheme of a joint-stock company; when he causes the usual books to be opened, and allows, or causes the inscription of the name of a person as an owner of an interest

to a definite amount and value therein, which is false within his own knowledge; when he embodies such false statements in a certificate of this right, directly issued, and of the same effect as if signed by himself; when he accompanies that certificate by a written power, authorizing a transfer at large by the party to whom he has given the certificate; when that representation induces an innocent person to advance his money;—the defendant's own individual act has created the privity of contract which the cases referred to, (in the Opinion of *Hoffman, J.*.) appear to demand; and he must be held responsible to any one who has been deceived." (Per *Hoffman, J.*) *id.*

Vide PRINCIPAL AND AGENT, 1, 2.
SALE.

FORECLOSURE.

(To which wife is not a party.)

Vide DOWER, 6, 7.

FRAUD.

Vide FALSE REPRESENTATIONS.

FRAUDS, STATUTE OF

1. When a purchaser of personal property, subject at the time to two mortgages which are valid liens thereon, promises one of the mortgagees, verbally, to pay to him a debt owing to him by a third person, which is secured by one of such mortgages, no action will lie on such promise, though founded on a good consideration. *Doolittle v. Naylor*, 206

2. Such a promise, is a promise to be answerable for the debt of a third person, which such third person continues liable to pay, and is void by the statute of frauds, unless in writing, and unless such writing expresses the consideration of it. *id.*

3. If such promise, instead of being made to such mortgagee, is made to a third person who is not liable for the

payment of such debt, no action will lie upon it at the suit of such mortgagee. *id.*

4. But when, in order to become such purchaser, and retain the use of the property, and to dissuade the holder of the second mortgage from enforcing his mortgage by foreclosure, etc., and to induce the holder of the first mortgage to assign it to his friend, such purchaser promises the second mortgagee that he will pay the first mortgage, and will also, by a day named, pay the second mortgage, if a sum agreed on be deducted therefrom, and the second mortgagee agrees to the deduction, and agrees to forbear, and, in reliance on the promise, does forbear enforcing his mortgage to the day named; and upon procuring such agreement, such purchaser, with the assent of the second mortgagee, induced by such promises, prevails upon the holder of the first mortgage—also induced by the promise that the second mortgage shall be paid—to assign the same to a third person, who advances the amount thereof—

And thereafter a sale is made, under the first mortgage, at the instance of such purchaser, and he again becomes the purchaser at the sale, and repays the advance so made, the first mortgage will, as between such purchaser and such second mortgagee, be deemed paid and extinguished, and the second mortgage be regarded as the first lien upon the property, although, as between such purchaser and subsequent encumbrancers, the first mortgage may still be treated as valid, and subsisting at the time of the sale so made under it. *id.*

6. Under such circumstances, the first mortgage will be treated as paid and extinguished, when that course is required to subserve best the purposes of justice. It will not be treated as subsisting and valid, except to subserve an innocent purpose injurious to no one. *id.*

7. And when, on established facts, such first mortgage, as between a purchaser at a sale under it and such second mortgagee, will be deemed satisfied and extinguished, a mortgagee of the same property, under a mortgage exe-

cuted by such purchaser, will acquire no rights superior, in equity, to those of said second mortgagee. On the contrary, the lien of the latter will be preferred, in equity, to him. *id.*

8. To render a verbal promise valid, when made by the defendants, to a third person, to pay to the plaintiffs, creditors of the promisee, a debt which he owes to them, it must be founded upon a consideration, and arises out of a transaction, by force of which, the promisors become substantially the debtors of the promisee, in respect of the sum, and to the amount which they thus agree to pay, so that making payment, according to the terms of the promise, will be a satisfaction of their own debt, or the discharge of an obligation, resting upon them, as principals. *State Bank at New Brunswick v. Mettler,* 392

9. When the promise places the promisors in the position of sureties for the debt of their promisee, so that making the promised payment, will convert the promisors into creditors of the promisee, for the amount so paid, the case falls within the statute, and the agreement is void, if not in writing, though based upon a consideration sufficient to uphold it. *id.*

Vide AGREEMENT, 6, 7.

FREIGHT.

1. A *pro-rata* freight is due, only, when the owner of the goods elects to receive them at an intermediate port; and this election can only be made, when the master is able and willing to transport them to their place of destination. *Alt'e Mut. Ins. Co. v. Bird,* 195
2. When the vessel is wholly disabled during the voyage, and no effort or offer is made by the master or shipowner to save the goods and forward them to their port of destination, their acceptance by their owner is compulsory, and no freight is demandable. *id.*
3. Freight cannot be recovered upon the original contract, because it has not been performed, nor upon an implied

contract, if the goods are accepted from the necessity of the case, and because the master and shipowner have ceased to make any efforts for their preservation; because, under such circumstances, the owner only takes up his own goods on finding them abandoned. *id.*

Vide INSURANCE, 1.

III

HUSBAND AND WIFE.

Vide MARRIED WOMEN, 1.
DOWER, 1, 8.

I

INFANT.

1. Whether an infant can bring an action during her minority, to rescind a purchase made by her of personal property, and to obtain a surrender of promissory notes and a chattel mortgage of such property made and executed by her, for, and to secure, payment of the contract price? *Quare. Gray v. Lessington,* 257
2. When, in an action to rescind, she bases her right of action on the fact of her infancy at the time of making the contract, and on the further fact, that the defendant fraudulently misrepresented the value of the property, and imposed upon the plaintiff's inexperience, the burden of proving misrepresentations made, and imposition practised, is upon the plaintiff. *id.*
3. Upon the question of good faith, as to the representations made of its value, it is competent for the defendant to show that, shortly previous to such sale, the defendant bought and paid for it, at the prices represented by her to be its value. *id.*
4. The terms, on which a rescission will be allowed, are a restoration of the property to the defendant, and the

payment of such sum as, with the payments made on account of the purchase, equals the deterioration of the property in value, caused by the plaintiff's use of it. *id.*

5. When the value of the property at the time of the infant's purchase of it, upon the evidence given, would appear to exceed, very greatly, its value at the time it was restored to the defendant, or was offered to be restored; and it becomes a fair subject of inquiry, whether this difference in value results from a misuse of the property, or whether its value, at the time of the infant's purchase, is over-estimated, the uses to which it has been put by the infant, is a proper subject of inquiry. *id.*

6. When such property has been sold, *pendente lite*, by a receiver appointed by the Court, the plaintiff is to be allowed, as the value of the property when it went into the hands of the receiver, all that it sold for, though that sum may exceed its value as established by the testimony given upon that point. If it sells for less, the defendant is, nevertheless, to be deemed to have taken possession at the time it went into the receiver's hands, and the contract being rescinded, is to be charged with such sum, as its value, as the evidence shows it was then worth, and takes the proceeds of the sale, as a substitute for the property in the condition it then was. *id.*

INJUNCTION.

Vide LANDLORD AND TENANT, 5, 6.
PARTY WALL.
SABBATH.
TRADE MARKS, 1-5.
USUARY.

INSURANCE.

1. An insurance company that insured the goods, and that has paid a total loss on an abandonment by the owner and assured, having contracted with a third person to forward the goods to the port of destination, for fifty per cent, of their net proceeds, who did so

forward them, is entitled to recover half of such net proceeds, notwithstanding the ship-owner, after such contract is made, claims freight on the part so saved, and directs such third person to retain such freight, or pay it to the ship-owner's agent. *Atlantic Mut. Ins. Co. v. Bird, et al.* 195

Vide *Freight*, 1, 2, 3.

J

JOINT DEBTORS.

1. In an action for the recovery of money only brought against two or more defendants upon an alleged joint contract, if one of the defendants fail to answer, and the others deny the plaintiff's allegation, the plaintiff cannot regularly enter up judgment against the one defendant for the want of an answer, and then proceed to trial and judgment against the other defendants. *Sluyter v. Smith,* 673
2. In such case he should bring the cause to trial as against all of the defendants to the end that he may, upon the trial of the issues, have one assessment of damages, and one judgment against all of the defendants. *id.*
3. On bringing the cause to trial upon the issues, he may have such assessment, and may have such judgment against the defendant who does not answer, although he fails on the trial of the issues to show that he is entitled to recover against the defendants who have answered. *id.*

JOINT OWNERS OF VESSEL.

When one may maintain an action against another. *Wood v. Merritt,* 368

JUDGMENT.

1. When it is more favorable than the defendant's offer. Vide *Feldings v. Mills,* 489

2. Manner of amending a judgment and the record thereof.
Vide *PRACTICE*, 1.—Amendment, 4.
JOINT DEBTORS.

JUDGMENT OF A COURT OF ANOTHER STATE.

1. In an action in this State, upon a judgment recovered in a sister State, if it appear that the Court by which it was rendered had jurisdiction of the subject matter, and of the person of the defendant, such judgment is conclusive. *Rocco v. Hackett,* 579
2. The Courts of this State will not inquire into the merits of the plaintiff's claim, nor whether the judgment was recovered according to law, even though it be alleged that the most obvious dictates of justice were violated. *id.*
3. Where an action was brought on a judgment of the Superior Court of Suffolk County, Mass., which judgment was duly proved, and it appeared, that the defendant appeared, by his attorneys, in the action; and further, that such judgment was recovered on a prior judgment of the Court of Common Pleas:

Held, the defendant cannot defeat a recovery in this State, by proving that he never owed the plaintiff the debt; that he was never a resident, inhabitant or citizen of Massachusetts, but of New York; that he was never served with process in, or had any notice of the judgment in the Common Pleas, until sued thereon in the Superior Court; that, by the laws of Massachusetts, he was, in the said Superior Court, prevented from setting up any defence to the action; and that the judgment of the Common Pleas was, by the same laws, declared legal and valid. *id.*

Neither, nor all, of these facts can be received here as a defence. *id.*

L

LANDLORD AND TENANT.

1. A landlord, in the absence of an express covenant, is under no obligation,

to repair, or to do any act to protect his tenant from the consequences of the lawful acts of the owner of adjoining premises, in excavating them to such depth as would endanger the stability of the demised premises. *Sherwood v. Seaman.* 127

2. Chap. 6 of the Laws of 1855, has not altered the duties and liabilities of a landlord to his tenant. *id.*

3. Mere knowledge of the landlord, that his tenant is willing that he should give the license, provided for by that statute, does not create a duty to give it, nor subject the landlord to an action, because he did not give it. *id.*

4. To subject the person excavating to the expense of protecting the adjoining building, he must "be afforded the necessary license to enter on the adjoining land." This must be explicit, and sufficient to protect him in doing the acts to be done, to perform the duty the statute creates; and it would seem, that it should be given by all persons who would be injuriously affected by such acts. *id.*

5. Where a lessee covenants, in the lease executed to him, for a particular use of the demised premises, equity will restrict him to that use by injunction. *Dodge v. Lambert.* 570

6. Where the use sought to be enjoined, violates not only the covenant of the lessee, but the sanctity of the Sabbath, the interposition of the Court by injunction is eminently proper. *id.*

7. Where, by the terms of the lease, it cannot be assigned without the written consent of the lessors, and it is assigned by virtue of the written consent of a person professing to act as their agent; and as a consideration of obtaining such consent, the assignees covenant to make such use of the premises as their assignor had covenanted to make, and they enter upon the premises and occupy them solely by virtue of such consent and assignment; they cannot, in a suit brought by the lessors against them to restrain them from using the premises for purposes other than those specified in their covenant, compel the lessors to prove that their professed

agent was, in fact, such agent, having the powers which he assumed to exercise. *id.*

8. A suit by such lessors, to enforce the contract, is, as between them and such assignees, a ratification and adoption of the acts of such agent, and in such a case, sufficient evidence of his authority. *id.*

9. In such an action, the defendants cannot show, as against their landlords, that the latter have no beneficial interest or estate in the demised premises. *id.*

10. It is no defence to such an action, that the use covenanted not to be made, and which the defendants are making, in violation of their covenant, is not a public or private nuisance; nor that such prohibited use will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant. *id.*

11. A declaration of the agent, that his principals would not enforce such covenant, if no disorderly or improper conduct was permitted on the premises, is no defence to an action to enforce the covenant. *id.*

Vide SLANDER.

LANDS UNDER WATER.

Vide WATER GRANTS, 1-6.

LIEN.

1. When a mechanic, in the course of his business, makes repairs, upon an agreement to give credit for a stipulated time, he has no lien upon the articles so repaired for the value of such repairs. If the person, for whom they are made, becomes insolvent before the article so repaired goes out of the possession of the mechanic, the latter cannot assert a lien on account of such intervening insolvency. *Fielings v. Miles.* 489

2. There is a marked difference, in some respects, between the right of stoppage, *in transitu*, and that of a mechanic to detain. Insolvency alone creates the former. The common-law right of a mechanic to detain, arises and exists, as well against a solvent as an insolvent employer. Neither the solvency nor the insolvency of the latter can be deemed an element in the creation of the right of lien which exists in favor of the mechanic. *id.*

*Agreement to discharge lien on Chattels purchased by promisor, (vide *Frauda*, Statute of, 1-7.)*

*Vide *Venamus*, 7-10.*

M

MARRIED WOMAN.

1. Where a husband does nothing for the support of his wife, and she, having a separate property, employs herself in trading therewith, with his knowledge and assent, he neither assisting nor interfering therewith, such property does not become, in equity, liable for his debts. It remains, with its proceeds and profits, her sole and separate property. *Freeman v. Orser*, (5 Duer, 476,) commented on, and distinguished from this case. *Burges v. White*, 92

*Vide *Downe*, 1-8.*

MECHANICS' LIEN.

*Vide *Lien*.*

MONEY LENT.

*Vide *PARTNERSHIP*, 1, 2.*

MISREPRESENTATION.

*Vide *Vendor AND PURCHASER*, 1.*

MORTGAGE FOR PURCHASE MONEY.

*Vide *Downe*, 1-8.*

MORTGAGE OF CHATTELS.

1. Under what circumstances a first mortgage may be treated as paid, in favor of holder of a second mortgage. *Doolittle v. Naylor*, 206

2. The defendants, on the 25th of August, 1858, sold to D. & F. four billiard tables, for \$1100, taking ten notes, of \$100 each, at 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 months, and a note made by one Clark and a mortgage of the four tables to secure the payment of the notes made by D. & F., (the mortgage providing, that on default to pay either of those notes, all the notes should be due, and the mortgage might be foreclosed;) and agreed, in writing, that, "after \$300 has been paid of said notes," to "give a receipt in full for one table, and so continue until all are paid." On the 14th of January, 1856, the defendants signed and delivered to D. & F. a paper which states that they had received from D. & F. \$275, "for one billiard table; said table being one of the four tables included in a mortgage given by said D. & F."

In March, 1856, D. & F., not having paid more, the defendants foreclosed the mortgage, sold, and, at the sale, bought all of the tables; and, on the 8th of September, 1856, the plaintiff, who had succeeded to the rights of D. & F., demanded of the defendants one of the four tables (who refused to deliver it); and thereupon brought an action of trover to recover its value. Held, that on such a state of facts, the plaintiff could not maintain such an action, and that his complaint was rightly dismissed at the trial. *Clerk v. Griffith*, 558

3. An acceptance of the purchase-price of one table, does not bind the mortgagee, (holding a mortgage for the purchase-money of four tables,) to give up or release either table, until the whole is paid; or, if he have agreed to release one on payment of \$300, then, until the whole \$300 is paid. *id.*

4. When a mortgagor has agreed to release one of several chattels mortgaged on payment of a specified portion of the debt, an agreement made

by him, on payment of a lesser portion of the debt, (the sum paid having, in fact, become payable,) to release one of the mortgaged chattels, is without consideration, and void. *id.*

Vide **FRAUDS**, Statute of, 1-7.
INFANT, 1-6.

MOTION.

Vide **PRACTICE**, 13.—**Motions**.

MUNICIPAL CORPORATIONS.

Vide **CORPORATION**, 3-5.
NEW YORK CITY, 1-5.

N

NEGLIGENCE.

1. When a collision occurs between a train of cars, in which the plaintiff was at the time a passenger, and another train, and the plaintiff was, at the time, standing on the platform of a car, and was injured, he is not entitled to an instruction to the jury, "that, if the conductor of the train on which he was knew of his being on the platform and did not object, the consent of the company may be presumed, and the company would be liable," unless upon the evidence, it is free from doubt, that he was injured by the negligence of such company, without any fault on his part; and if the notices, authorized by § 46 of chap. 140 of the laws of 1850, were posted up at the time inside of the passenger cars then on the train, then, also, that the company at the time did not furnish room inside of its passengers cars, sufficient for the proper accommodation of the passengers. *Higgins v. N. Y. & Harlem R. R. Co.*

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2. If such notices were duly posted at the time, and sufficient room was furnished inside of the cars for the proper accommodation of the passengers, the mere fact that the conductor did not object to the plaintiff's standing on the

platform, would not justify the presumption that the company assented to waive a protection given to them by statute, which these notices expressly declared they should claim, and on which, they informed all passengers, the company would insist. *id.*

3. In an action, by the owners of an omnibus or stage, against a railroad company, to recover damages for an injury to the stage, resulting from a collision between it and a car of the company, while the car is being drawn by horse-power; (which collision is alleged, by the plaintiffs, to have been caused by the negligence of the company's servants; and which collision is alleged, by the defendants, to have been caused by the sole, or concurring negligence of the driver of the stage; and there is evidence tending to show negligence of both parties, which concurred to produce the injury;) the true rule to be stated to the jury is, that if the collision and injury were caused by the concurring negligence of both parties, neither can recover against the other, and the defendants are entitled to a verdict. *Owen v. Hudson R. R. Co.* 374
4. In such a case, it is erroneous to instruct the jury, that if they "believed that the brakes of the car were not in good or sufficient working order, so that they were inefficient for the purpose of checking the progress of the car; and if they shall be satisfied that the driver of the car had time enough, after he discovered the dangerous position of the stage, to have avoided the collision by the application of the brakes, if they had been in good order, then the plaintiffs will be entitled to recover, notwithstanding the plaintiff's driver was guilty of imprudence or carelessness in getting into such a position." *id.*
5. When the negligence of the company consists in not having their car furnished with a suitable and efficient brake, in good working order; and although, but for such negligence, there might have been no collision and no injury, notwithstanding the plaintiffs were negligent; yet if the plaintiffs were, at the time, in fact, negligent, and if their negligence concurred with the defendants' negligence to produce the injury,

such facts present the case of an injury caused by the concurring negligence of both parties, and neither can maintain an action against the other, to recover any damages resulting from it. *id.*

6. It would seem, that when one of two persons, by his own negligence, is unexpectedly placed in a position of danger, from which he cannot be extricated uninjured without ordinary care and a reasonable use by the other of the means, at the time, at his command, to prevent an injury to the former; and the latter sees the former, and the position in which he is placed, in time to prevent the injury by the exercise of ordinary care, and by reasonable efforts on his part in the use of such means, and he fails to exercise such care and make such efforts, and by reason thereof, the former is injured, the latter is liable. *id.*
7. In a case of such peculiar and extreme circumstances, the negligence of the defendant is proximate, and that of the plaintiff remote, and the injury, in judgment of law, is imputable solely to the party who had it entirely within his power to prevent it, by ordinary care in the use of the means then at his command to avoid it, but who failed to use such care, although seeing and knowing that the other party could not, at the time, by any act on his part, escape the threatened injury. *id.*

Vide **Action**, 6-8.
ARCHITECT, 1.
BANK CHECK, 1, 2, 3.
CARRIERS, 1-6.

NEW TRIAL.

1. A general verdict, ordered for the plaintiff, will not be set aside merely because the Judge, at the trial, submitted to the jury special questions, and which they answered affirmatively, when, upon the evidence given, the Judge might have ruled, with propriety, that the propositions, which the answers of the jury to such questions affirmed, had been satisfactorily established, and entitled the plaintiff to a verdict. *Cook v. Litchfield* 187

Vide **REVERSENCE**, 1.
PRACTICE, 2—**Appeal**, 1.

NEW YORK (CITY OF).

1. The charter of the City of New York, as amended April 12, 1858, requires that all work involving the expenditure of more than \$250, shall be done by contract, on sealed bids, and that all such contracts, when given, shall be given to the lowest bidder. A contract entered into by the officers of the Corporation in violation of this provision, is illegal, and void, and imposes no obligation on the city. *Brady v. the Mayor, da. of New York*. 173
2. Although bids are advertised for, and received, yet, if they are tested by a comparison which brings into view only a part of the work contracted for, and by such means the contract is awarded to one who was not, in fact, the lowest bidder, the contract is invalid. *id.*
3. When the officers of the Corporation called for bids for flagging a sidewalk, and laying a curb and gutter, and the making of excavation of earth and rock, if any, and stated that the lowness of the bids would be tested only by the price at which the bidders offered to lay the flagging, and curb and gutter;
Hold, that a contract awarded upon such a test, when it was impossible to determine by such test who was the lowest bidder, was void in respect to the excavation. *id.*
4. Where the contract under which the work is done, is void, because entered into in violation of the charter, the contractor cannot recover for the work in any form—neither under the contract, nor as upon a *quantum sursum*. *id.*
5. A subsequent ratification of the contract by the Common Council, whether before, or after the work is done, does not make it binding on the Corporation. *id.*

Vide **LANDS UNDER WATER**,
WATER GRANTS, 1-6.
PIERS AND SLIPS—**Action**, 1-4.

NOTICE OF PROTEST.

Vide **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 3, 4, and 5.

NON-SUIT.

Vide **PRACTICE**, 14—Non-suit.

NUISANCE.

Obstruction of public Slip.
Vide **Action**, 1, 2, 3, and 4.

O**OFFICERS—**

Of Corporation exceeding their powers.
Brady v. The Mayor, &c. 173

P**PARTIES.**

Vide **PRACTICE**, 17—Parties.

PARTNERS AND PARTNERSHIP.

1. A firm is not liable for money lent on the application of a person employed by them, without their knowledge or authority, and used by him for his own purposes, when there is no evidence that the loan was solicited in the firm's name, or for its use, although at the time of the loan he was interested, in a particular department of their business, in the profits and losses of sales made to customers that he might procure and induce to purchase; especially when there is no evidence that he was held out as a partner, or was known or supposed to be interested as such, in any of the business of such particular department. *Porter v. Loback*, 188

2. And although the lenders, having dealings with such firm, render an account, say in January, 1851, to such

B.—II.

firm, charging that firm with the money so lent, in this form: "our loan to Mr. Tripler, \$1186.40;" and although the account is retained some six months, yet, if no act has been done, directly or indirectly affirming its accuracy, but on the contrary its accuracy was disputed in the following March and August, and when last disputed, the firm was requested, by the lenders, to allow the account to stand as it was until the return of such borrower from Europe, such account cannot be treated as a stated and settled account, which such firm is not at liberty to dispute. *id.*

3. Settlement of accounts of a trading adventure opened on the ground of fraud. *Sheldon v. Wood*, 267
4. If one partner, upon a dissolution of the firm, assigns to his co-partners all his interest in all the property and assets of the firm, and covenants not to interfere with the collection of the debts owing to the firm, and subsequently, for a valuable consideration, received by himself, settles and receipt, as paid to him, one of the debts so assigned, an action will lie against him, at the suit of his co-partners, to recover the amount of such debt. *Ross v. West*, 360

5. It is no answer to such action, that the original debtors might, notwithstanding such settlement, be sued by his co-partners to recover such debt, on the ground that no money was paid, or property delivered on such settlement, but that the defendant received the debt, as paid to him, on receiving from such debtors a receipt that he had paid to them, in full, a debt of an equal amount, which he, individually owed to them. *id.*

PARTY WALL.

1. When a lot of land was conveyed, in 1783, to P. by W., 28 feet in breadth in front and rear, by precise boundaries, but the grantor excepted and reserved to himself and his heirs and assigns, forever, one half of the westerly wall erected or to be erected by P. or any other person holding or claiming under him on the westerly side of the

47

premises, adjoining the lot of W., and W. covenanted to pay half the expense of maintaining and supporting such wall; and P. erected a dwelling-house on such lot, 28 feet in front, with a westerly wall 12 inches in thickness; and W. afterwards erected a dwelling-house on his lot, using such westerly wall as a support therefor. *Ogden v. Jones,* 685

Held, that the reservation in the deed in connection with the covenant of W. did not reserve to W. the fee in the ground on which the half of the wall was erected, nor any such property in the wall as entitled him to remove it, or to cut it away, or undermine it, or build upon it; but only the right to use it as a support for his adjoining building. *id.*

2. Neither W. nor his grantees have any right to cut away the front of P.'s house, and extend the front of the building on such adjoining lot, over the westerly line of the 28 feet, so as to present to the exterior view a front extending to the centre of such westerly wall. *id.*

3. An injunction will be granted in such case, to prevent a grantees of W.'s lot from interfering with such westerly wall, in any manner, except by using it as a support for the adjoining building. *id.*

PASSENGERS.

(Injury received when standing on platform of Rail-road Car.) *Higgins v. New York and Harlem R. R. Co.* 132

PATENT.

Contract to improve Machinery and obtain Patent.

Vide *Agreement*, 8, 9.

PIERS AND SLIPS IN THE CITY OF NEW YORK.

Vide *Action*, 1, 2, 3, and 4.

PLEADING.

1. *ANSWER.*
2. *COMPLAINT.*
3. *COUNTER-CLAIM.*
4. *DEMURRER.*
5. *INCONSISTENT ALLEGATIONS.*

1. Answer.

1. An answer which first denies all the allegations in the complaint, and then in subsequent paragraphs admits certain of the averments, does not leave it doubtful what allegations are put in issue. *Willett v. Metropolitan Ins. Co.*, 678

2. But statements in an answer which are in direct conflict with each other ought not to be permitted to stand; such conflict tends to encumber the pleadings and may often render the real nature of the defence doubtful. *id.*

3. In such case, the general denial will be struck out, unless the defendant amends, by so modifying the general denial that it shall not deny allegations afterwards in the answer admitted. *id.*

4. In an answer, containing several defences, each defence, separately pleaded as a distinct defence, must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof of which it purports to answer. *Xenia Branch Bank v. Lee*, 694

5. The former rule, which required each plea to be complete in itself, and to constitute a defence to the allegations to which it was addressed, has not been relaxed by the Code. *id.*

6. These propositions do not necessarily import that, in order to avoid repetition, allegations of fact which form a part of several defences may not be once stated, and be thereafter incorporated in each successive defence, by appropriate words of reference, instead of repeating them at length in each. *id.*

2. Complaint.

1. A Complaint, upon an award, which

directs one party to pay to the other a sum named, on demand, and provides, that on payment by the one of that sum, and the receipt of it by the other, each shall execute and deliver to the other a release, in full, of all claims and demands, from the beginning of the world to the date of the submission, unless it avers the delivery, or tender of such a release, by the party to whom the sum is awarded to be paid, or an offer to deliver the same, on payment of the sum so awarded, does not state facts sufficient to constitute a cause of action, notwithstanding it avers a demand of payment, and a neglect and refusal by the defendant to pay the sum awarded. *Cole v. Blinn,* 116

2. In declaring against a common carrier, for loss of goods, it is enough that the plaintiff avers the delivery of the goods, and the defendant's undertaking or duty, and its neglect or breach, without an averment that the plaintiff was himself without fault. *Richards v. Westcott,* 589

3. In a complaint on a bond, given to procure the discharge of a warrant of attachment, issued under the Act, entitled, "Of proceedings for the collection of demands against ships and vessels," the plaintiff should, in order to sustain the bond as a statute security, not only aver the facts, showing that such warrant of attachment was duly issued, and that the bond was executed by the defendants, and that the claim of the creditor has not been paid; but also, that the bond was delivered to the officer by whom the attachment was issued, in such wise, that it became his duty to grant a discharge of the warrant. *Clark v. Thorp,* 680

4. If such averment be made, it will be presumed that the officer did his duty; that the applicant for the discharge obtained the benefit thereof; and that so the bond became operative in the plaintiff's favor as a statute security: although it be not averred that the officer approved the security, nor that the discharge was granted, nor that the vessel was released from the custody of the sheriff. The acceptance

of the bond by the officer would import that he approved of the security. *id.*

5. And, if the warrant was not in fact discharged, nor the vessel released, the defendant must set up such facts as a defence. *id.*

6. But, where the complaint does not aver that the bond was delivered to the officer, nor that he approved of the security, nor that an order for the discharge of the warrant was granted, nor that the vessel has been released from custody, such complaint cannot be sustained upon the bond, regarded merely as a statutory security. *id.*

7. But such a bond is, nevertheless, a valid security, and not a merely voluntary obligation; the seals import consideration; and the condition being the payment to the plaintiff of the claims, etc., exhibited, which should be established to have been subsisting liens upon the vessel, and a breach of the condition being alleged, the complaint is sufficient, notwithstanding it does not show the full compliance with the statute. *id.*

8. The Court, as the general rule, will not, on a motion made by the plaintiff, after a cause is at issue, and in the orderly course of proceeding, consider the objection, that the complaint does not state facts sufficient to constitute a cause of action. *Banks v. Maher* 690

3. Counter-claim.

Vide PRACTICE, 5.—Counter-claim.

4. Demurrer.

1. On a demurrer to an answer, on the ground that the averments therein are not sufficient to constitute a defence or counter-claim, if the Court are clear in their opinion, that the answer is defective in substance and the demurrer is well taken, they will sustain the demurrer, although the ground of their opinion is one which was not suggested nor discussed by counsel on the argument. *Xenia Branch Bank v. Lee,* 694

5. Inconsistent Allegations. Vide Answer.

Vide FRAUD, 1, 2.
PRACTICE, 17.—**Parties.**

PRACTICE.

1. AMENDMENT.
2. APPEAL.
3. ASSESSMENT OF DAMAGES.
4. COSTS.
5. COUNTER-CLAIM.
6. DEFAULT.
7. DEPOSITIONS.
8. DISCOVERY.
9. EXEMPTIONS.
10. HEARING AT GENERAL TERM.
11. INCONSISTENT ALLEGATIONS.
12. INJUNCTION.
13. MOTIONS.
14. NONSUIT.
15. NOTICE OF APPEAL.
16. OFFER TO ALLOW JUDGMENT.
17. PARTIES.
18. SEVERANCE.
19. SUBSTITUTION OF PARTY.
20. SUMMONS.
21. TRANSFER OF INTEREST.
22. TRIAL AND VERDICT.

1. Amendment.

1. When, in an action on a note lent to the payee by the defendant without any restriction as to its use, the answer, by not denying, admits the allegations of the complaint, that the defendant made and delivered the note to the payee, who endorsed and delivered it to the plaintiff; the defendant should not be permitted at the trial to amend his answer, by inserting an averment, that the payee of the note, at the time it was so made and endorsed, was a married woman. The refusal of a Judge to permit such an amendment, if he has power to allow it, is a matter resting in his discretion, and cannot be reviewed, on an exception to his decision. *Robbins v. Richardson*, 248

id.

2. To allow it, in such a case, even if the power to grant it is unquestionable, would permit a technical matter to be alleged, to admit proof of a defence not meritorious. *id.*

3. Where the summons in an action is signed by the firm name of two attorneys who are in partnership, and the complaint is served with the summons, signed with the individual name of one of such attorneys only, and all subsequent notices and papers in the action are signed by such individual name of the attorney last named, the Court has the power after judgment to amend the summons by substituting the individual name of the attorney for such firm name. *Slyter v. Smith*, 673

4. Where it becomes necessary to amend a judgment, and the judgment record in the particular above mentioned, and also by striking out an award of costs erroneously directed, it is not proper to make an actual obliteration of the record, or an erasure of such parts thereof as are deemed erroneous or intended to be amended. It should be done by entering an order of amendment in the proper order book kept by the clerk, and appending a copy thereof to the judgment record. It is also proper to mark the passages struck out by the amendment by brackets or lines of distinction, and to refer by an entry in the margin of the judgment to the order of amendment by its date; or the judgment, as amended, may be entered at length if the party so desire. *id.*

5. Amendment of notice of appeal, vide *infra* Appeal 8-12.

2. Appeal.

1. When a party, moving for a new trial, is not entitled to it, as a matter of right, he cannot, on an appeal by him from an order granting it on terms, procure its reversal by reason of such terms. They are matters resting purely in discretion, and are not reviewable on appeal. *Burger v. White*, 92

2. The objection, that the complaint does not state facts sufficient to constitute a cause of action, can be taken on an appeal from the judgment, although it was not taken at the trial; and although the allegations of a demand of payment, and of the neglect and refusal to pay, are not controverted by the answer. *Cole v. Blunt*, 116

2. When, in an action upon a policy of insurance against loss or damage by fire, the answer admits a loss, but not to the amount claimed, and sets up grounds of defense, and a referee is ordered, "only to ascertain and determine the amount of any loss sustained by the plaintiff, for the recovery of which such action is brought," and such referee executes the order and reports the amount of such loss, and, on a subsequent trial of the action, his report is read in evidence without objection, and a verdict passes for the plaintiff; the defendant, on an appeal from the judgment, cannot review the accuracy of the referee's decision, as to the amount of such loss, nor in respect to the admission or rejection of evidence, on the proceedings before him, as such referee. *Ehlen v. Rutgers' Fire Ins. Co.* 482
losing party desires to urge both grounds in the General Term, though it may not be irregular to include both appeals in one notice. *id.*
3. To allow an alteration or amendment of a notice of appeal from the judgment, so that it may embrace also an appeal from an order denying a new trial, would be authorizing an appeal where none has been taken. This can no more be done, than a new and separate notice can be permitted; and this cannot be done, although the party appealing intended, in good faith, to appeal from, and review the order denying a new trial; nor, although he and his attorney, in good faith, believed, that the appeal which he had taken from the judgment, would bring that order under review, and was the only appeal necessary. *id.*
4. It seems that the report might have been excepted to, and reviewed on a special motion. 9. The Court have no power to extend the time within which an appeal may be taken. (§ 832.) (Hoffman, J., dissented.) *id.*
- (Rule 32, of the Rules adopted in August, 1858, prescribes the mode of reviewing such a report.)
5. Where costs are allowed to the plaintiff on an adjustment by the clerk to which he has no legal right, and which the defendant cannot be required to pay without a violation of the statute, and the Court at Special Term deny a motion to correct the adjustment, an appeal lies to the General Term. *Slyter v. Smith.* 673
10. The Court are not authorized to do indirectly, under color of amending the notice of appeal, what they may not do directly, by authorizing a new notice of appeal. *id.*
6. An appeal from a judgment does not bring under review an order denying a motion for a new trial. On the appeal from the judgment entered upon a verdict, only the questions of law arising upon the record or the exceptions can be considered. Those grounds which are peculiar to motion for a new trial,—such as excessiveness of damages, verdict contrary to evidence, misconduct of juror, newly discovered evidence and the like,—can only be considered in the General Term on an appeal from an order granting or refusing a new trial. *Fry v. Bennet,* 684. (Vide 16 How. Pr. R. 385—401
11. A notice of appeal, if there be particular defects therein, which do not destroy its substantial character, may be amended. *id.*
12. But where a notice of appeal from a judgment has been given, in all respects perfect, and containing nothing more, the Court may not allow an amendment, so as to make the appeal also an appeal from an order denying a new trial, after the time for appealing from such an order has expired. (§ 174.) *id.*
7. Two appeals are necessary when the 13. The mere fact, that the respondent, on an appeal from a judgment, appears and argues some points, which properly belong to a motion for a new trial,—and which an appeal from a judgment does not bring under consideration,—does not waive a notice of appeal from the order denying a new trial; nor does such an appearance give the General Term jurisdiction to reverse such order. *id.*

14. Section 332 of the Code requires that appeals to the General Term "be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing."

Held, thereupon, that unless after the order is made, or judgment rendered and entered,—or filed and constructively entered, so as to become a part of the record or minutes of the Court,—the party has some written notification thereof by act of the prevailing party or his attorney, his time to appeal continues without limitation. *Fry v. Bennett*, 684. (Vide 16 How. Pr. R. 402; 7 Abbott Pr. R. 352.)

15. The party may acquire knowledge of the order or judgment; he may examine it on the files of the Court or on its records; or may procure a copy of it from the clerk. And for many purposes, this or any actual knowledge of the order or judgment will be *notice*; but, as a *limitation of the time to appeal*, knowledge so acquired will be wholly inoperative. *id.*

16. The Court do not decide that an execution issued upon the judgment, exhibited to the party and levied, or a copy of the order or judgment certified by the clerk and served without further authentication, would not be a sufficient notice. *id.*

Vide Title *APPEAL, ante.*

3. Assessment

Of damages against one of two joint debtors. *678*

4. Costs.

1. When a defendant, before answering, serves an offer that the plaintiffs may take judgment, for a sum named, with costs, which offer is not accepted, and subsequently puts in an answer which not only controverts the amount due, upon the plaintiff's cause of action, but sets up a counter-claim, and the plaintiff recovers the precise sum offered and a judgment that the defendant is entitled to nothing upon his counter-claim, they recover a more favorable judgment than that offered,

and the defendant is not entitled to costs, as a matter of right, from the time of such offer. *Fieldings v. Mills*, *489*

Vide *PRACTICE, 2. Appeal 5.*

5. Counter-Claim.

1. The maker of a note given to a bank, when sued by a receiver of its property and effects, cannot enforce, as a counter-claim against the note, a demand against the bank not due, either when the note matured, or the receiver was appointed. *United States Trust Co. v. Harris*, *75*

2. A defendant is not at liberty to give evidence, on the trial, of items of set-off, or counter-claim, when no such defence is alleged in his answer. An averment, that, since the settlement, which the complaint seeks to avoid, to the end, that an accounting may be had, the defendant "has discovered a large amount of indebtedness (from the other party to such settlement) to him, of which he was then ignorant," not specifying of what it consists, or how it arose, is not such a specification of a counter-claim, or set-off, as will make evidence of it admissible. *Sheldon v. Wood*, *267*

3. In an action, in the nature of Trover, brought to recover the value of notes or bills of exchange from a defendant who claims title thereto through the plaintiff's endorsement, where the plaintiff sets out the title under which the defendant claims and seeks to recover such value, by impeaching that title, the defendant may set up and affirm his own title, aver demand of payment, refusal, protest, and notice to the plaintiff of non-payment; and demand, by way of counter-claim, a judgment against the plaintiff, as indorser of such notes or bills. *Xenia French Bank v. Lee*, *694*

4. Such a counter-claim is proper, both as "arising out of the transaction, which is set forth in the complaint as the foundation of the plaintiff's claim," and also, as a cause of action, "connected with the subject of the action." *id.*

5. The definitions of a counter-claim, in § 150 of the Code, considered; and the extension of the right beyond claims formerly set up, under the name of recoupment, also noticed. *id.*

Vide **VESSELS**, 3.

6. *Default of one of two joint Debtors.*

Damages when and where assessed. p. 673

7. *Deposition—Motion to Suppress.*

Vide **DEPOSITIONS**, 8.

8. *Discovery.*

Vide **TITLE DISCOVERY OF BOOKS AND PAPERS.**

9. *Exceptions.*

Vide **TITLE EXCEPTIONS.**

10. *Hearing at General Term.*

1. The General Term has no right, of itself, to deduce facts from evidence, in order to found a judgment. *Brower v. Orser, Sh'ff.* 865

2. The amendment, in 1857, of the 333d section of the code, has not varied this rule, or established another, in relation to proceedings that may be had at the trial, or in relation to the powers and duties of the Court at General Term. *id.*

Vide **TRIAL AND VERDICT**, 4.

11. *Inconsistent Allegations.*

Vide **PLEADINGS**, 1—Answer.

12. *Injunction.*

Vide **LANDLORD AND TENANT**, 5, 6.
PARTY WALL.
SABBATH.
TRADE MARKS, 1—5.
USURY.

13. *Motions.*

1. That complaint does not state facts sufficient to constitute a cause of action, cannot, in general, be objected, on a motion. 690

2. Motion to make definite and certain. 678

3. Motion to substitute another plaintiff on transfer of interest. 690

14. *Nonsuit.*

Vide **SLANDER**, 4, 5.

15. *Notice of Appeal.*

Amendment thereof.—**APPEAL**, 8—12.
Waiver thereof.—**APPEAL**, 13.

Vide **APPEAL**, 14—16

16. *Offer.*

To allow judgment to be taken.
Vide **COSTS**, 1.

17. *Parties.*

1. The objection that there is a defect of parties, must be taken by demurrer, if the defect appear on the face of the complaint. If it do not so appear, it must be taken by answer, or it is waived, and cannot be started on an appeal from the judgment. Although all persons, who might properly be, have not been made parties, and that appears at the trial, the Court may decide the controversy between those before it, when it can do so without prejudice to the rights of others, or by saving their rights. The mere fact, that the rights of a defendant, who has not taken the objection by demurrer, may be prejudiced, is no ground for reversing a judgment upon that objection being first taken on an appeal from the judgment.

Held, on the facts of this case, that the defendant could not be prejudiced by having the action determined on its merits, without other persons being made parties. *Sheldon v. Wood*, 267

2. A written instrument, whereby the defendant promised "to pay to V. C., as executive agent of the company—Bureau, G., G. & Co.—the sum of \$5000," is legally payable to the company represented by V. C., and not to V. C., the agent. *Considerat v. Brisbane*, 471 and that the defendant's promise to pay, is, legally, a promise to the company, which alone is interested therein. For this reason, therefore, also, the agent V. C. cannot maintain the action. *id.*
3. Under the provisions of a statute, which required that all actions shall be brought in the name of the real party in interest, V. C., the agent, cannot maintain an action in his own name, upon such an instrument, to recover the sum agreed to be paid. *id.*
4. The proviso in such statute which authorizes the trustee of an express trust to sue in his own name, and defines such trustee as one "with whom or in whose name a contract is made for the benefit of another," does not enable V. C. to sue in his own name upon such an instrument. The contract, in such case, is not, in a legal sense, made in the name of V. C., nor with him. *id.*
5. The consideration of such promise, being stated in the instrument in these words: "for which I am to receive stock of the said company, to the amount of \$5000," indicates that the company is the real party to the contract, entitled to receive the money, and by whom the stock is to be delivered. *id.*
6. If, upon the face of the note, it were deemed doubtful whether the contract was with V. C. personally, and the words describing him as executive agent were not conclusive to the contrary; averments in the complaint that the company—Bureau, G., G. & Co.—is a corporation; that V. C. was, in making the contract, acting as the agent, and as such was authorized to receive subscriptions to the stock of the corporation; and that the defendant authorized him to subscribe the name of the defendant in the company's books, as an original subscriber; and that the defendant executed the instrument for the payment of the sum named for the shares so taken by the defendant in said company; show, conclusively, that the contract was made by the defendant with the company,
- Vide *Substitution*, *infra*, 19.
18. *Sessance.*
1. The right of the plaintiff to sever his action, and take judgment against one of two defendants severally liable, and the construction of §§ 136, 246, and 274 of the Code considered. *Blyster v. Smith*, 673
19. *Substitution of Party.*
1. When, pending an action, the whole interest of the plaintiff in the cause of action has been transferred to a third person, the Court, on the application of such third person, may allow him to be substituted as plaintiff. *Banks v. Maher*, 690
2. Although the original plaintiff sues as receiver of a bank, and his appointment as receiver is put in issue by the defendant's answer, the Court, on a motion to substitute, as plaintiff, a person to whom the receiver's interest has been transferred, will not investigate and determine such issue, though required to do so by the defendants' counsel. Such an issue can only be tried and determined on the trial of the action. *id.*
20. *Summons.*
- Amendment thereof after judgment. p. 673
21. *Transfer of Interest of Plaintiff.* p. 690.
22. *Trial and Verdict.*
1. When the jury, in an action for the recovery of money, in addition to answering special questions submitted to them by the Court, find a general verdict for the defendant, and the

Court at the trial directs the questions of law arising on the trial to be first heard at the General Term, and judgment to be there applied for in the first instance, the plaintiff cannot have a judgment, unless the facts specially found are inconsistent with the general verdict, and entitle him to such judgment. *United States Trust Co. v. Harris,* 75

2. And though the Court, in charging the jury, instructs them, in addition to answering the special questions, to find a general verdict for the *plaintiff*, yet, if they find a general verdict for the *defendant*, and the Court thereupon, against the objection and exception of the defendant, directs such general verdict for the defendant to be changed to a general verdict for the plaintiff, subject to the opinion of the Court at General Term, on the idea or assumption that the general verdict, as the jury gave it, is inconsistent with the finding upon the questions submitted, the Court at General Term, must give such judgment as ought to have been given, if the general verdict, actually rendered, had not been changed by the order of the Court. The Court, at the trial, has no power to order a verdict for one party to be changed to a verdict in favor of the other party, on any such ground. *id.*

3. It is within the discretion of the Court, after the evidence is stated to be closed, to open the case, and permit further evidence to be given. *Burger v. Whits,* 92

4. A verdict should not be taken at the trial, for the plaintiff, subject to the opinion of the Court on the whole evidence, with a view to its decision of disputed questions of fact. But when that is done, and the Court at General Term, at the instance of counsel, hear the case on its merits, they will disregard the objection that a particular and material fact is unproved, when such objection was not taken at the trial, and some evidence in support of it was given, and the whole proceedings tend to show that it was understood at the trial that no such objection was relied on. *Porter v. Lobach,* 188

5. It is discretionary with the Court, or referees, to permit a witness to be re-examined after he has left the stand. *Sheldon v. Wood,* 267

6. It is irregular to take a verdict subject to the opinion of the Court at General Term, when there are facts to be settled upon contradictory or doubtful testimony. *Brower v. Orser, Sheriff,* 365

Vide *NEW TRIAL*, 1.

PRACTICE, 1.—*Amendment*, 1-2.

“ 10.—*Hearing at General Term.*

SLANDER, 4-5.

PRINCIPAL AND AGENT.

1. See *New York, City of*—*Corporation officers*. *Brady v. The Mayor, &c.* 173

2. The plaintiff was the owner of a promissory note made by third persons, and employed a broker to sell it for him. The latter employed another person, as his agent, to effect the sale. The defendant agreed with such agent to buy the note, if another note of the same maker, falling due on the 13th of October, owned by the defendant, and payable at a bank in Brooklyn, was paid. This negotiation was had in the City of New York. On the 14th of October, such agent positively represented that the note had been paid, which was untrue. On this representation, a check was given for the note, payment of which was stopped, and which is now sued upon. It was drawn to and endorsed by such agent, and by him delivered to the broker, and by the latter to the plaintiff.

Held, that the false representation of the agent of the broker was of the same effect as if made by the broker himself, and that the plaintiff could not acquire a title to a security for money, so obtained. *Kiwell v. Chamberlain,* 230

3. *Held*, that whether the agent did or did not know that the other note was not paid, was immaterial. *id.*

4. In judgment of law, the acts of a mere

agent, (not shown to have any interest in the subject,) done avowedly for the principal, and on his behalf, and by his authority, are the acts of the principal only; and contracts made with the agent, in such representative capacity, are contracts with the principal, and not with the agent. *Considerant v. Brisbane.* 471

5. In such case, the agent is not personally liable upon the contracts, and he cannot maintain an action thereon in his own name. *id.*

Vide AUCTIONEERS, 1-4.
LANDLORD AND TENANT, 7-11.

PRIVILEGED COMMUNICATION.

Vide SLANDER, 1-5.

PROMISSORY NOTES.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

PROTEST.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES, 3, 4, 5.

R

RAILROAD COMPANIES.

Liability to passengers standing on the platforms of their cars. *Higgins v. N. Y. and Harlem Railroad Co.*, 182

Vide NEGLIGENCE, 1-14.

RATIFICATION.

Of a void contract. Vide *Brady v. The Mayor, etc.*, 173

RECEIVER.

Title to moneys on deposit in bank.

Vide DEBTOR AND CREDITOR, 1, 2, 3.
PRACTICE—Counter-claim, 1.

RECORD.

How to amend.

Vide PRACTICE, 1—Amendment, 4.

RESCINDING.

Purchase of chattels, etc., by infant, 258

REFERENCE AND REFERERS.

1. When the decisions of referees on questions of law are correct, and their conclusions of fact are so supported by the evidence, that the Court is not at liberty to set aside their report, as being contrary to evidence, there is nothing on which to base the proposition that the report should be set aside, on account of their undue bias and partiality, when no extrinsic facts are shown, or alleged, which would warrant even a suspicion of such bias or partiality. *Sheldon v. Wood*, 267

Vide FRAUD.
PRACTICE, 2—Appeal, 3, 4.

RIGHT OF WAY.

J. B. was the owner of several contiguous lots, fronting on a public street, running to the corner formed thereby with an intersecting street, and, also, of the contiguous lots in the rear, fronting on the cross street; and for 40 years prior to his death, he had used an alley-way, running from such cross street, along the rear of the first-named lots, as a means of access and egress from and to the rear of such lots, upon the rear of one of which was a small house, let from time to time, to various tenants, who used the alley-way.

After the death of J. B. the premises continued to be so used for several years, and one of the lots was leased, by the heirs, for five years, and was described in the lease, as bounded northerly, in the rear, by an alley for the use of this lot in common with

the lot adjoining. This lease, by assignment, came to the plaintiff. Afterwards, during the term of the lease, partition was voluntarily made by such heirs, and in conveying the said lot to the one to whom it was allotted, it was described in the deed, as "running to the southerly side of the alley-way, and thence southeasterly, along the said alley-way, 21 feet 10 inches," and it was conveyed, "together with all and singular the appurtenances," etc. The lot was thereafter, before the expiration of the lease, conveyed in the same terms by such grantee, to the plaintiff, the tenant in possession. *id.* After the expiration of the lease, the defendant, a grantee of other of the heirs, closed the alley by an erection on the line of the cross street. *Held,* in an action to compel the removal of the obstruction, and for damages,

1. No easement was created, during the life of J. B., which would pass to the grantee of one of the lots by mere force of the word "appurtenances" in the deed from the heirs-at-law, so as to give such grantee a right to use the alley-way. No one can be said to have an easement in his own land, and no right of way could exist, as such, so long as the title to the alley and the contiguous lots was vested in fee in the same person. *Huttemeter v. Albro,* 546

2. The conveyance made on the partition of the lots, describing one of them as running to the alley, and running along the alley, in connection with the actual use of such alley at that time, and for many years before, as a way of ingress and egress from and to such lot, are sufficient to show an intent to create the easement, and to confer the right of way on the grantee, who thereby acquires an easement in the alley, which, in turn, passes to his grantee. *id.*

3. Where a lot is conveyed which has a front bounding on a public street, the grantee does not take "a right of way by necessity," through an alley lying at the rear of the lot, although there be on such rear a dwelling house, and the grantor has, for forty years, used the alley as a way of ingress and egress for his tenants in such house. *id.*

S

SABBATH.

An injunction will be granted to restrain the breach of a covenant, by a tenant, not to use the demised premises in violation of the Sabbath. *Dodge v. Lambert,* 570

SALE.

1. The plaintiffs offered to sell the balance of their stock of cutlery to the defendants, and exhibited a list or invoice thereof, with the prices, which list was represented to contain an approximation to the sizes, quantities and qualities of such cutlery; and the defendants agreed to buy the same, on a credit of eight months, at a deduction of fifty per cent, from the list prices.

The cutlery was, soon thereafter, all delivered to and accepted by the defendants. There was delivered with the cutlery a complete invoice of it, containing the actual descriptions, sizes, quantities, qualities, and list prices of the same. The defendants were requested to examine the cutlery, and if any thing was wrong, to inform the plaintiffs immediately. During the stipulated term of credit, the defendants made no objection to the cutlery. They sold and disposed of it.

Held, that, there being neither fraud nor warranty, the defendants were liable to pay fifty per cent, of the prices stated on the invoice delivered with the cutlery, although the latter invoice varied in some particulars, as to the quantity and quality of portions of the cutlery, from that exhibited at the time of the agreement to purchase. *The Eagle Works v. Churchill,* 166

Vide AUCTIONEERS, 1-4.

INFANT (may rescind), 1-6.

PRINCIPAL AND AGENT, 1-3.

SPECIFIC PERFORMANCE, 1, 6.

SEAL.

IMPORTS CONSIDERATION,

p. 680

SEPARATE ESTATE.

Vide MARRIED WOMAN, p. 92

SETTLEMENT

Of accounts opened on the ground of fraud, p. 267

Vide ACTION, 9, 10.

SHIPS AND VESSELS.

Vide VESSEL.

SLANDER.

1. A landlord has such an interest in knowing the character and reputation of his tenants, that words spoken to him by a third person in answer to inquiries made respecting the character of a tenant, are, in their nature, privileged; and if the words are spoken without malice, such third person is fully protected. *Liddle v. Hedges*, 587

2. The burthen of proving actual malice in the speaking, when the words are spoken on an occasion which creates the privilege, is upon the plaintiff. *id.*

3. The language employed by the defendant may be such as to warrant the inference of malice, without other proof; and if the Court can see that such an inference may reasonably be drawn from the words alone—as where they are such as to indicate passion, ill-will, or a disposition to incite hostility, or are vituperative beyond what the occasion seems to require—the question of malice should be submitted to the jury; although, if not maliciously spoken, the speaking was privileged. *id.*

4. But, on the other hand, if the Court can see that the language used will warrant no such inference, and there be no other proof of malice, it is the duty of the Court to order a nonsuit,

or a dismissal of the plaintiff's complaint. *id.*

5. The question of malice in a communication, written or spoken on a privileged occasion, stands in this respect, on the trial of an action of slander, etc., like any other question of fact in any other action. It is to be submitted to the jury, if the evidence be such as would sustain a verdict for the plaintiff, and not otherwise. *id.*

SPECIFIC PERFORMANCE.

1. In an action by vendors, to compel the specific performance of a contract for the purchase of real estate, the relief asked will be granted, even though there be a bare possibility, that the title may be affected by existing causes; which may be subsequently developed, provided the highest evidence of which the nature of the case admits, and amounting to a moral certainty, be given, that no such causes exist. *Schermerhorn v. Nibley*, 161

2. Thus, when the title of the vendors is that of sole heirs-at-law of a person dying on the 15th of December, 1855, and their contract to sell was made in February, 1856, and the action was tried in January, 1857, and after thorough search, no will of the deceased had been found, up to the time of the trial, and he died leaving personal estate, worth over \$10,000, and his debts and the demands against his estate, so far as ascertained, do not exceed \$500, the possibility of discovering a will, or that other debts and demands may be presented to his administrator, are not sufficient to deprive the vendors of the right to a judgment for a specific performance. *id.*

3. Where a vendor of the unexpired term of a lease improperly refuses to perform the contract of sale, and deliver possession, compensation should be made to the purchaser, for the depreciation in the value of the term, by reason of the lapse of time during the litigation. *Radford v. Wilson*, 237

4. The purchaser is not entitled (as he

might, perhaps, have been in an action for damages upon a special case) to have any allowance, because material improvements contemplated by him at the making of the contract, were prevented. *id.*

5. The amount to be allowed to him, is to be adjusted upon the basis of placing him in the same position as if the contract had been executed according to its terms, the premises continuing unchanged, though preserved in their then existing state of repair. *id.*

6. He should be allowed a full annual rent for the premises, deducting, however, all legal outgoings, such as taxes and ground rent; and should, also, be allowed a sum for the wear and tear of the buildings, unless properly kept up by the vendor. *id.*

Held, that these principles had been properly applied to the facts, by the judgment at Special Term, and such judgment affirmed.

7. In cases of this nature, the rule is, that a party to a contract of sale of lands, shall not be allowed to profit by his own fault, in not performing his agreement, nor to cause a loss to the other. *id.*

8. Where the fault is on the part of a vendor, the Court will, when justice requires it, relieve the purchaser from the payment of interest on his purchase money. But in such case, the vendor remains entitled to the rents. (Per Hoffman, J.) *id.*

9. The vendee may elect, to treat the contract as really made at the time when he is put in possession. In such case, he may be exempted from paying interest for the period of litigation, but will leave the rents to the seller. All rights will be adjusted as if the contract was dated at the latter period. (*Id.*) *id.*

10. And in the case of the sale of an unexpired leasehold, by the lessee, the question will then be, what, upon the basis of the purchase money being the value at the date of the contract,

is the value at the date of possession. (*Id.*) *id.*

11. If there is a decree in favor of the purchaser, under which he could take possession, and he omits to do so, the ordinary rules between vendor and purchaser, of charging interest on the one side, and rents on the other, will be observed from the date of such decree. *id.*

12. The plaintiff would have gained by adopting this rule; (see statement upon that basis;) but he has elected to make his claim upon the footing of his being owner from the date of the contract. (Per Hoffman, J.) *id.*

13. Principles of allowance, where the fault is on the part of the purchaser, discussed. (*Id.*) *id.*

STATUTES, CONSTRUCTION OF.

1 Rev. Stat. 589. "Of Monied Corporations," §1, sub. 8. *U. S. Trust Co. v. Harris*, 75

1 Rev. Stat. 740. "Of Estates in Dower." *Wheeler v. Morris*, 524

2 Rev. Stat. 398. "Of taking Depositions *de bene esse*." *Sheldon v. Wood*, 267

2 Rev. Stat. 398. "Of Proceedings to Perpetuate Testimony." *id.*

2 Rev. Stat. 491. § 18. "Dower Estate subject to Taxes." *Graham v. Dunigan*, 516

2 Rev. Stat. 493. "For the Collection of Demands against Ships and Vessels. *Clark v. Thorp*, 680

Vide *PLEADING*, 2.—*Complaint*, 4—7.
Vessels, 7—10.

Laws of 1821, p. 143; Laws of 1848, p. 325. *Apportionment of Taxes. Graham v. Dunigan*, 516

Vide *TAXES*, 1—5.

Laws of 1830, ch. 179, p. 203. Concerning "Factors and Agents." *Bonito v. Moquera*, 401

Laws of 1850, ch. 140, § 46. Passengers on Platforms of Cars. *Higgins v. N. Y. & Harlem Railroad Co.*, 132

Laws of 1855, ch. 6. On Excavations in New York, etc., *Sherwood v. Seaman*, 127

STATUTE OF FRAUDS.

Vide FRAUDS, STATUTE OF.

STOCK.

Purchase by Bank of its own Stock,
p. 75.

SUNKEN VESSEL.

Vide ACTION 1, 2, 3, and 4.

T

TAXES.

1. Where certain apartments in a dwelling-house, in the City of New York, are assigned to a widow on an assignment of dower in her husband's real estate, and the residue are in possession of the heir-at-law, or his grantee, the taxes and assessments are the subject of equitable apportionment between her and such heir, or his grantee. *Graham v. Dunigan,* 516 *id.*
2. But no such apportionment can be made, by the assessors or collector of taxes etc., or other public authorities of the city, so that either can pay a portion thereof, and discharge his or her part of the premises from the charge or incumbrance. *id.*
3. If, in order to relieve her own share of the premises from the charge, prevent the accumulation of a percentage imposed as a penalty for the non-payment, and save the premises from sale for taxes or assessments, the widow pays the whole amount, she may recover from the heir-at-law, or his grantee, his just share or proportion of the amount paid, with interest from the time of such payment. *id.*
4. Such share or proportion of the taxes is to be ascertained by taking into view the relative annual value of those parts of the premises held by each

respectively; and, in dividing the assessment, the nature of the improvement for which the assessment is made should be considered, having regard also to the benefit resulting therefrom, and its probable permanency, and also the age of the tenant in dower, and also the probable duration of her estate. *id.*

5. The annual water rate, for the use of the Croton water, is subject to the same division. But a charge for Croton water, separately and specifically made for a particular use, which use is exclusively confined to the apartment of one of the parties, should be borne in whole by such party. *id.*

TITLE TO LANDS.

Vide SPECIFIC PERFORMANCE, 1, 2.

TITLE TO PROPERTY.

Vide VESSELS, 4, 5, 6, 7, 8, 9, and 10.

TRADE MARKS.

1. A manufacturer of goods, who, in order to designate his own manufacture, has adopted names, marks, and labels, which are peculiar, and not theretofore used, is entitled to be protected by a court of equity in the use thereof, as trade marks, against fraudulent or deceptive imitation by others. *Williams v. Johnson,* 1 *id.*
2. This is true, although the article manufactured by him is composed of well-known ingredients, in general use for that purpose, and which any person may combine and sell at his pleasure; trade marks in such case being appropriately employed to denote a manufacturer of the article, by the person using them, and to notify those who buy and use the article, that his peculiar skill, in combining the ingredients, have been employed therein. *id.*
3. An injunction will be granted to restrain the use by another of labels, de-

vices, or handbills, in imitation of, or simulating such trade marks. *id.*

4. Whether a mere name of an article, or a designation of a place of manufacture, can or cannot become the subject of protection, as a trade mark, the Court will restrain the use thereof in such a combination, with peculiar devices and labels, as will tend to deceive the public, and induce the erroneous belief in the minds of dealers and consumers, that the articles are manufactured by the person introducing or adopting the same, to distinguish his goods. *id.*

5. Slight differences calling for scrutiny, or concealed by artifice, so as to escape the attention of the unwary, are not sufficient to protect the imitator of a trade mark from liability. *id.*

TRIAL.

Vide Practice, 22.—Trial and Verdict.

TRUSTEE

Of an express trust.

Vide Practice, 17.—Parties.

U

USURY.

1. On a bill filed to recover back securities pledged for alleged usurious loans, if all the equities alleged in the bill are fully met and denied by the answer, and the defendant is fully solvent and of sufficient responsibility to answer to all claims the plaintiffs may establish, an injunction granted, *ex parte*, to restrain the collection or disposition of the securities, should be wholly dissolved. *Storer, et al v. Coc,* 661

2. But the answer is not necessarily to be taken to meet and overcome the allegations in the complaint, merely be-

cause it is couched in such terms of denial and explanation of apparently usurious transactions, as if true in their proper and just meaning would show that there was no usury. When the denials and explanations are themselves such as to leave great suspicion that they are untrue or evasive, or, that under cover of words describing commissions and payment for services, usurious exactions have been made by the defendant, the injunction should be continued to the hearing. *id.*

3. A voluntary payment of a mere gratuity by the borrower to the lender, on the return of a sum of money legally loaned, does not necessarily make the next loan between the same parties usurious, nor raise a presumption that it is so. But a long series of successive loans running through a period of fifteen months or upwards, and an invariable payment of large premiums on the return of the money or renewal of the period of credit, is so suspicious as to raise a presumption, that both parties understood that the payment of an exorbitant sum was the condition of the successive loans. *id.*

4. The statement in the answer, that large premiums which were paid to the defendant, were for "extra trouble," either in lending the defendant's own money, or in buying the borrowers' note, is of no weight in rebutting the charge of usury, unless the answer shows the particulars so as to exhibit an actual and *bona fide* sacrifice of time, money, or property, for the borrowers' benefit. *id.*

5. It is competent to show, that an assignment of judgments against third parties, made by the borrower to the lender, was made and received as security for loans, although such assignment is absolute in form. And the truth of allegations in the answer of the defendant, that such assignment was absolute in fact, and on a purchase of the judgments, will be discredited where the whole transaction is such as to render that statement highly improbable. *id.*

6. Where it is manifest that the plaintiffs may suffer loss by permitting the

defendant to collect the moneys due upon securities held for loans, which are alleged to be usurious, the Court, if they deem the answer insufficient to overcome the equities in the complaint, should restrain such collection, although it may appear that the money, if collected, would be entirely safe in the hands of the defendant. *id.*

sulting others more competent to judge than himself, when the opinion was honestly expressed, and no deceit was practised to put him off his guard. *United States Trust Co. v. Harris*, 75

*Vide AUCTIONEERS, 1-4.
SPECIFIC PERFORMANCE.*

VERDICT.

General and Special.

*Vide PRÆTOR.—Trial and Verdict.
NEW TRIAL, 1.*

VESSELS.

1. Where a complaint charged the defendants as common carriers generally, without describing their route, proof that their route was confined to New York and Brooklyn creates no variance. Under an averment that they undertook to carry from Brooklyn to Buffalo, if it be proved that they undertook to carry to New York, and, having delivered the goods at the wrong place, they undertook to recover and deliver them at Buffalo, the variance is not fatal. *Richards v. Westcott*, 589
2. Where the plaintiff avers a delivery of goods to the carrier by himself, and a promise to himself to carry, and it appears that the agent of the plaintiff delivered the goods, and the promise was made to him, there is no variance. *id.*

1. It is not an absolute unqualified rule, that a joint owner of a vessel may not sustain an action against the other owners, for contribution to a demand paid by him, during the continuance of the relation. If it appears, that at a certain period, such as the time of a report of a referee, no accounts are outstanding, which might change the apparent liability of a party, or wholly displace it, the fact of the joint ownership continuing, will not defeat a suit to recover a proportion of a sum paid to a creditor under a judgment recovered. *Wood v. Merritt*, 388
2. Each owner is responsible only to an amount proportionate to his interest in the vessel. *id.*

VENDOR AND PURCHASER.

1. When personal property is purchased, upon a misrepresentation of its value, but such representation is made in good faith, and in an honest belief of its truth, the purchaser must pay a note given by him for its price, he having retained the property bought, although it may have been worthless at the time of the purchase. To constitute a defense to an action to recover the contract price of property sold, it is necessary to prove more than that the vendor expressed an erroneous opinion of its value, in which the purchaser chose to confide, instead of exercising his own judgment, exclusively, or con-

3. In an action to recover that aliquot part, the defendant may have allowed to him, by way of counter-claim, the plaintiff's aliquot part of a liquidated demand owing by the owners of the vessel, as such, to the defendant. *id.*
4. Under a contract for the building of a vessel, the ownership continues in the contractor until the vessel is completed and delivered to the party for whom she is built. *Brown v. Morgan*, 485
5. The same rule applies where the contract limits the building to "the hull, spars, top iron work and cabin," for a sum specified, "payments to be made as the work progresses." *id.*

6. When a ship is built by the contractor, under such an agreement, the party for whom she is built is not responsible to a third person for materials, or articles used in the construction of the hull of the ship, which, by the contract, the contractor was bound to provide and use therein. *id.*
7. To entitle a party to a lien upon a vessel, under 2 R. S. 498, § 1, sub. 1, (as that statute read prior to the amendment of it made in 1865,) for the price or value of "materials or articles furnished in this State" by him "for, or towards the building" of such ship or vessel, on the application of the person building such ship or vessel, he must prove that the materials claimed to have been furnished, were actually incorporated into such vessel; that they were used in it, as well as ordered for it. *Hiscox v. Harbeck.* 506
8. The facts, that materials are ordered for a vessel which the purchaser is then building, and are furnished upon, and pursuant to such order, and are sent to the yard where that and other vessels are being built, is not *prima facie* evidence of the use of them for the purpose for which they were ordered, although there be no evidence impairing or affecting the proper force and effect of such facts. *id.*
9. The contrary of this proposition having been charged, and the charge having been excepted to, a new trial was ordered. *id.*
10. An agreement entered into before the building of a vessel is commenced, between the defendants and such builder, that the vessel should "become the property of the former as fast as the payments were made on her;" and the further facts, that before the materials were furnished by the plaintiffs, the builder was overpaid, by the defendants, for all work and materials; and that the builder having failed before completing her, the defendants, "having overpaid him more than the work and materials were worth," took possession of her and completed her, make the defendants at all times, owners of the vessel, as the building of her progressed, and consequently pre-
- sent a case, in which the person ordering the materials of the plaintiffs was not at the time, the "owner, agent, or consigned" of such vessel, within the meaning of the statute, and, therefore, the plaintiffs would acquire no lien on the vessel, for the price of such materials. (Hoffman, J.) *id.*
11. Bond for discharge of attachment. 680
*Vide FREIGHT, 1-3.
 INSURANCE, 1.
 PLEADING, 2.—Complaint, 3-6.*

W

WARRANTY.

Vide SALES.

WATER GRANTS.

P. S. was, prior to 1805, the owner of a farm on Manhattan Island, in the City of New York, lying on a semi-circular cove or bay of the East River, and between what is now 9th and 23d streets, in the said city. By his will, he divided this farm into two parts, making a street, which ran through the same and which reached the river near the centre of the cove, the dividing line; and devised the northerly portion to his son P. G. S., and the southerly portion to his son N. W. S. And thereafter, in 1810, the Corporation of New York made a grant to N. W. S. of a water lot in the river easterly of his portion of the farm, making the continuation of the centre line of Stuyvesant street, the northerly boundary of such grant. On a survey of the cove, it appears that the continuation of the centre line of Stuyvesant street outwardly to a line drawn between the two extremities of the shore line, would divide the intermediate space into two parts nearly corresponding in relative or proportionate quantity with the length of the shore lines of the two divisions of the farm so held by P. G. S. and N. W. S. The plan of this part of the City of New York was laid out under the Act of the

Legislature of April 8d, 1807, and the streets thereby established ran to the shore of the cove in a direction diagonal to the cove, and so as to cross Stuyvesant street at an acute angle, in such wise that 15th street, which crossed Stuyvesant street near the point where it reached the water, would, when extended into the East River, run far south thereof at the line drawn between the two extremities of the cove, and divide the cove very unequally; and the other parallel streets (16th, 17th, 18th, and 19th) if so extended, would in like manner cross the centre line of Stuyvesant street. (Diagrams, Nos. 1 and 3, pp. 22, 24.)

Subsequently, the Corporation of New York made grants to Bradford and others, claiming under N. W. S., of all the ground under the water in the cove, lying southerly of the said centre line of Stuyvesant street, and extending into the river to a street, or proposed street, called Tompkins street; and to Flack and Gouverneur, claiming under P. G. S., of all ground under water, extending in like manner into the East River, lying northerly of the said centre line of Stuyvesant street extended. (Diagram No. 2 p. 23.)

By an Act of the Legislature of 18th April, 1826, the new street, called Tompkins street, theretofore laid out and approved by the Corporation, was established as the permanent exterior line of the city on the East River, in front of the cove above mentioned, extending northerly to 23d street; and the statute enacted that all grants made, or to be made, of lands under water, should be construed as rightfully made to extend thereto.

In 1835 another Act was passed, authorizing the Corporation to designate where the exterior line or street to the eastward of this part of the city shall be in place of Tompkins street. And in 1850 certain ordinances were passed establishing an exterior line, called Avenue D, further outward in the East River, beyond and easterly of the said Tompkins street.

Upon a bill filed, on the one hand, to confirm the grants made to N. W. S., and those claiming under N. W. S. and under Bradford and others, and to establish the centre line of Stuyvesant street extended into the East River, as their just northern boundary, and to

restrain the Corporation from making new grants southerly of that line; and on a bill filed, on the other hand, asserting that such former grants were void, and that the claimants under P. G. S. and Flack and Gouverneur were entitled to grants in front of their lands, to extend outwardly into the East River in the lines or direction of the streets established in 1807, extended eastwardly; and to settle the rights of the various present proprietors in the cove.

Held, upon a review of the various statutes, etc., referred to in the opinion of the Court and statement of the case,

1. First. The line of Stuyvesant street, continued to Tompkins street, would have formed the proper natural and equitable boundary, as between N. W. S. and P. G. S., had the Corporation undertaken to make grants to them of the space within the cove; upon the principle of an equitable division between them in respect to their ownership on the shore, assuming either that, by virtue of such ownership of the upland, they were entitled, under the Act of 1807, to claim and have such grants, or that the corporation were willing to concede to them such a right, and this notwithstanding that, according to the plan of the city adopted by the commissioners under that act, the streets as laid out by them, if continued into the cove, would have followed lines running in a different direction. *Nott v. Thayer*, 10 And such line of Stuyvesant street formed a proper northerly boundary in the grant to N. W. S. of 1810, as between him and his brother, at the time the same was made. *id.*

2. Second. The same line of division was equally equitable and proper, as between Flack and Gouverneur on the one side, and Bradford on the other, as parties succeeding to the title and rights of N. W. S. and P. G. S. respectively, at the time those grants were made; and the plaintiff, Nott, as succeeding to Bradford's title, is entitled to claim, as against the parties to the suits who have succeeded to Flack and Gouverneur, that Stuyvesant street thus continued, and constituting the actual boundary between their respective grantees, is the true,

proper, and equitable line by which those grants respectively ought to have been made. *id.*

3. Third. However true it may be that the lines or direction of the streets continued may form the most convenient and, under certain circumstances, a proper basis upon which to make water grants, that still this is a matter of mere convenience, and that this alone creates no rule of obligation on the Corporation, nor one that gives to the parties entitled to or claiming grants an absolute right as against the Corporation, or as against each other, to have them run by such lines. That the question, as between co-terminous owners of the shore line, is always one of equitable apportionment of the space to which the grants are to apply, and that the exact lines of division must necessarily depend upon the relative directions of the shore line and of the exterior line to which it is intended the grants shall extend. *id.*

4. Fourth. Without deciding, or intending to express an opinion, whether the corporation, under the Act of May the 11th, 1835, (providing for the designation, etc., of a permanent exterior line,) may or may not lawfully project or lay out a new exterior line or street to the eastward or outside of Tompkins street, or whether, if they once have adopted a line within Tompkins street, as such new exterior line, they have thereby exhausted all their power under said act;

Held, that no fee is given to the Corporation by implication, as certainly none is given in terms by the Act of 1835, in the lands under water outside of or to the eastward of Tompkins street, and that, consequently, no grant of such lands made or to be made by the Corporation conveys or can convey a fee in such lands to the grantees. *id.*
And further held, that the act cannot be construed to extend by implication the grants already made, bounding on

Tompkins street, to an exterior line or street, outside of Tompkins street. *id.*

5. Fifth. The parties to the suit, whose grants bound on Tompkins street, have no right, actual or pre-emptive, to grants outside of, or beyond that street; nor have they any right or title, derived from the Act of 1835, in the land under water between that street and Avenue D, the exterior line recently adopted; nor have they, as adjacent owners, a right to fill in such intermediate space, and become the proprietors thereof under the provisions of the Act of 1818. *id.*

6. Sixth. The parties are concluded by the grants already made bounding on Stuyvesant street, as the dividing line between the parties claiming adversely to each other in these actions, such line being also an equitable and proper one; and the claim of the owners to the north of that street cannot be sustained. *id.*

WIDOW.

1. As tenant in dower only bound to pay equitable share or portion of Taxes and Assessments. 516

Vide Dower, 1-8

WITNESS.

1. One of the arbitrators is a competent witness to impeach his award, by giving testimony of facts, they being open, and having transpired in the presence of the parties, and of their counsel. *Cole v. Blunt*, 116

Vide DEPOSITIONS, 1-7.

PRACTICE, 22.—*Trial, etc.*, 3-5.

THE END.

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